

ETHICS FOR AN OUTSOURCED GOVERNMENT

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In recent decades, the federal government has greatly expanded its use of contractors to perform services, and now purchases more than \$260 billion in services every year. The government has increasingly turned to contractors to accomplish its programmatic goals and contractor employees are now performing tasks that in the past had been performed by government employees.

While an extensive array of ethics statutes and rules regulate government employees to ensure that they make decisions in the interest of the government rather than a private interest, only a few of these restrictions apply to contractor employees. If a federal employee makes a recommendation on a matter that could affect her financial interest, she could be subject not only to administrative discipline but also to criminal prosecution. In most cases, a contractor employee who has that same financial interest and makes the same recommendation is not subject to any consequences. In fact, the government does not have any systematic way of even finding out when contractor employees have such conflicts of interest. The personal conflicts of interest of contractor employees are largely unregulated.

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In light of the fact that so much of the government's work is outsourced, the government needs to develop appropriate safeguards to ensure that the public interest is protected when contractors are doing the government's work. This report describes the complex set of government ethics statutes and regulations, identifies the principles underlying those restrictions, and suggests ways that those principles can be applied to government contractor employees.

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Introduction

In the fall of 2008, the Treasury Department was trying to figure out how to respond to the impending collapse of insurance giant AIG. AIG had issued billions of dollars of collateral debt obligations (CDOs) tied to the home mortgage market. Investment banks such as Goldman Sachs had purchased those CDOs, and as the home mortgage market tanked, those CDOs were coming due. AIG did not have the cash on hand to pay the investment banks, and the Treasury Department was concerned that an AIG collapse could result in even greater financial panic and chaos than the country was already experiencing in the wake of the Lehman Brothers bankruptcy.

In responding to AIG's financial difficulties, the government could have pressured the investment banks to accept a discount on their CDOs. In fact, the government used precisely that approach when Chrysler was on the verge of collapse the following year. But instead, the government decided to pay face value to the banks. The government spent over \$100 billion to bailout AIG, and more than \$5 billion of that went to Goldman Sachs. The government even pressured AIG to waive its right to sue the banks for any misrepresentations regarding the CDOs.²

The government's handling of AIG was controversial and some have referred to it as a bailout not just of AIG but also of the investment banks. Because the government's handling of the AIG would affect the fortunes not just of AIG, but also of the investment banks, government ethics restrictions prevented any government employee with stock in Goldman Sachs from participating in the bailout operation. If a government employee advises the government on how to handle a matter that could affect her own investments, she could end up in prison. A criminal statute prohibits government employees from participating in

² Louise Story and Gretchen Morgenson, *In U.S. Bailout of A.I.G., Forgiveness for Big Banks*, N.Y. TIMES, June 29, 2010.

matters that can have a direct and predictable effect on their own financial interests.

But as described later in this report, the government's point person on the AIG bailout was Dan Jester, who had been the deputy chief financial officer at Goldman Sachs and who still owned a substantial amount of Goldman stock.³ Jester advised the government not to pressure Goldman and the other banks to accept a discount. Jester is not subject to criminal prosecution for this conflict of interest because the Treasury Department hired him as a contractor rather than as an employee. This technical maneuver exempted Jester from government ethics restrictions that are intended to protect the public trust.

An extensive and complex array of ethics statutes and regulations restrict current and former government employees' activities and financial interests. In general, these restrictions aim to ensure that when government employees make decisions, they do so in the interest of the government rather than for their own (or some other private) interest. These substantive restrictions are implemented by requiring employees to undergo ethics training; requiring certain employees to disclose their financial interests; subjecting those disclosures to review for compliance with ethics standards; and investigations of alleged violations.

Most of the ethics statutes and rules that regulate government employees do not apply to contractor employees.⁴ There is no comprehensive regulation of government contractor ethics, even of those individuals who are exercising discretion, providing services, or working

³ Mark Landler and Edmund L. Andrews, *For Treasury Dept., Now Comes Hard Part of Bailout*, N.Y. TIMES, Oct. 4, 2008; Louise Story and Gretchen Morgenson, *In U.S. Bailout of A.I.G., Forgiveness for Big Banks*, N.Y. TIMES June 29, 2010.

⁴ There are at least four distinct categories of individuals who perform work for the federal government's executive branch:

1. (regular) government employees, including both civil service employees and high-level appointees;
2. "special government employees" who work on a temporary or intermittent basis;
3. individuals whom the federal government "hires" as independent contractors (e.g., Dan Jester);
4. individuals whom contractors and subcontractors employ or "hire" as independent contractors to perform work for the government.

This report refers to individuals in the first two categories as "government employees," and refers to individuals in the last two categories as "contractor employees."

side-by-side with government employees in government offices.⁵

The government has barely begun to address the ethics of individuals who work for government contractors.⁶ The government's acquisition regulations instruct procurement officials to identify situations where corporations bidding on contracts have *organizational* conflicts of interest that could bias their work, but those regulations address only the financial interests of the companies rather than the financial interests of companies' employees.⁷ A few agencies have regulations addressing ethics issues faced by individuals working for contractors,⁸ but enforcement has been ad hoc and episodic, resulting in just one False Claims Act lawsuit.⁹ The government has not yet engaged in any systematic effort to address the conflicts of interest of those working for contractors, or to provide training on how to recognize and respond to such conflicts.

In 2007, a federal study found that "the trend toward more reliance on contractors . . . raises the possibility that the government's decision-making processes can be undermined,"¹⁰ and recommended that the government determine whether additional measures are needed to address the personal conflicts of interest of those working for contractors.¹¹ The following year, the Government Accountability Office recommended that the Defense Department institute personal conflicts of interest standards for contractors' employees.¹²

Recently, Congress has mandated the development of regulations

⁵ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 3 (2008) ("no [DoD] or FAR [Federal Acquisition Regulation] policy obliges DoD offices using contractor employees to require that they be free from personal conflicts of interest").

⁶ See Marilyn L. Glynn, Public Integrity and the Multi-Sector Workforce, WAYNE L. REV. 1433 (2006) (noting that "contractor employees are not subject to most federal ethics requirements or direct discipline by the government").

⁷ 48 CFR 2.101.

⁸ See Table V.

⁹ See *infra* note 154 (discussing *United States v. Harvard*, 323 F.Supp.2d 151 (D. Mass. 2004)).

¹⁰ REPORT OF THE ACQUISITION ADVISORY PANEL 417 (2007) ("Unless the contractor employees performing these tasks are focused upon the interests of the United States, as opposed to their personal interests or those of the contractor who employs them, there is a risk that inappropriate decisions will be made.").

¹¹ *Id.* at 423.

¹² GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 31-32 (2008).

to address conflicts of interest that arise in one specific area: where contractor employees are involved in purchasing goods or services,¹³ and in 2009 the government issued proposed regulations.¹⁴ But the proposed regulations are relatively narrow in scope, reaching only those contractor employees who provide advice or assist the government in acquisitions. The broader issue – how ethics principles and conflicts of interest restrictions should apply to government contractors more generally – has not yet been tackled.

Congress has tasked the Office of Federal Procurement Policy to work with the Office of Government Ethics to determine whether the government needs new regulations to address personal conflicts of interest of contractor employees who perform non-acquisition functions.¹⁵ This report does the groundwork on that issue, examining how government ethics principles should be applied to government contractors. Part I gives a brief overview of the extensive ethics restrictions that apply to executive branch government employees, discussing the stricter rules that apply to those in more sensitive positions and the looser rules that apply to those who work for the government on a temporary or intermittent basis. Part II discusses the principles that underlie many of these ethics restrictions. Part III documents that the executive branch has outsourced large amounts of work to contractors and that contractor employees are performing many of the same services as government employees. Part IV describes the few ethics restrictions that do apply to government contractor employees, discussing both the substantive standards and the mechanisms for implementing them. Part

¹³ § 841(a) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub.L. 110-417, 122 Stat. 4537 (requiring “the Administrator for Federal Procurement Policy [to] develop and issue a standard policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions”). In addition, Congress also required the Defense Department “to tighten existing requirements for *organizational* conflicts of interest by contractors in major defense acquisition programs.” § 207 of the Weapon Systems Acquisition Reform Act of 2009, Pub.L. 111-23, 123 Stat. 1704 (emphasis added); Proposed Defense Federal Acquisition Regulation Supplement; Organizational Conflicts of Interest in Major Defense Acquisition Programs (DFARS Case 2009-D015), 75 Fed. Reg. 20954 (April 22, 2010). For a discussion of the difference between personal and organizational conflicts of interests, see *infra* § IV.A.

¹⁴ Proposed Rule on Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58584 (Nov. 13, 2009).

¹⁵ Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, Pub.L. 110-417, 122 Stat. 4539, § 841(b)(3).

V proposes substantive standards for contractor employees who are in a position to exercise discretion or have access to government resources, and describes possible mechanisms for implementing those substantive standards. Part VI identifies areas for additional empirical research.

I The Extensive Array of Ethics Restrictions on Government Employees

More than a hundred pages of regulations and over a dozen statutes impose ethics restrictions on executive branch employees.¹⁶ This section will describe the restrictions that apply to all executive branch employees, stricter rules that apply only to certain employees (such as high-level officials, treaty negotiators and those involved in procurement), and the looser rules that apply to temporary or intermittent employees (Special Government Employees or SGEs). It will also discuss the primary mechanisms that the government uses to implement these standards, such as requiring many employees to disclose their financial holdings so that ethics officials can review them for compliance with the ethics standards.

A. Ethics Restrictions Applicable to all Executive Branch Employees

Government ethics restrictions can be divided into five substantive categories: financial influences on an employee's government work; the use of government position for non-government purposes; an employee's outside activities; an employee's post-government employment; and restrictions based on an employee's pre-government employment.

Restrictions on financial influences include limits on outside payments to government employees, on their own financial interests, and on their negotiating for future employment. With regard to outside payments, Congress has enacted criminal prohibitions on bribes,¹⁷

¹⁶ 5 C.F.R. Parts 2634-37, 2640; 18 U.S.C. §§ 201-219 (criminal conflict of interest statutes); 5 U.S.C. §§ 7351, 7353 (restrictions on gifts); 5 U.S.C. Appx. §§ 501-505 (limits on outside income). Most of these statutes also impose restrictions on legislative branch officials, but this report focuses on executive branch's employees and contractors.

¹⁷ 18 U.S.C. § 201(b).

gratuities related to government work,¹⁸ and “salary supplementation” (the payment by a non-governmental source for a government employee to do government work).¹⁹ In addition to these criminal prohibitions, there are also non-criminal statutory restrictions on gifts from foreign governments,²⁰ from those who could be affected by the employee’s work or by her agency,²¹ from subordinates or other government employees of lower salary,²² and regulatory restrictions on gifts²³ and compensation from outside employment (including the reimbursement of travel expenses).²⁴ A criminal statute prohibits executive branch officials from making decisions on matters that would affect their own financial interests or the financial interest of a family member, organization with which they are associated, or person with whom they are negotiating for future employment.²⁵

The government has also placed limitations on employees’ ability to use their position for private purposes. Examples include the statutory prohibitions on using one’s government position to influence an election²⁶ or to hire relatives,²⁷ and regulatory prohibitions on using public office for private gain,²⁸ using non-public government information for personal gain,²⁹ using government time or property for private purposes, such as writing letters of recommendation on government letterhead for recommendations unrelated to the subject’s government work;³⁰ and the disclosure of sensitive procurement-related information.³¹ Other regulations prevent employees’ from using their

¹⁸ 18 U.S.C. § 201(c).

¹⁹ 18 U.S.C. § 209.

²⁰ 5 U.S.C. § 7342.

²¹ 5 U.S.C. 7353.

²² 5 U.S.C. § 7351(a) (prohibiting employees from giving gifts to superiors and accepting gifts from employees receiving less pay).

²³ 5 C.F.R. 2635 Subparts B and C.

²⁴ 5 C.F.R. 2635 Subpart H.

²⁵ 18 U.S.C. § 208.

²⁶ 5 U.S.C. § 7323(a)(1).

²⁷ 5 U.S.C. § 3110.

²⁸ 5 C.F.R. 2635.702.

²⁹ 5 C.F.R. 2635.703.

³⁰ 5 C.F.R. 2635.702(b).

³¹ 41 U.S.C. § 423(a). This ban applies not just to government employees but to anyone “who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement.” *Id.* at § 423(a)(2)(A).

government position to further even beneficent outside interests, such as raising money for charitable organizations.³²

The government also limits its employees' outside activities. There are criminal prohibitions on employees' representing parties in disputes against the government³³ and regulatory restrictions on being awarded a government contract,³⁴ serving as an expert witness for an outside party in a case involving the government,³⁵ compensated teaching³⁶ and partisan political activities.³⁷

A fourth category of ethics restrictions consists of limits on post-government employment. All executive branch employees are subject to a permanent ban on communicating with current government officials in an attempt to influence them on behalf of someone else with respect to particular matters that the employee participated in personally and substantially while in government, and a 2-year ban on such communications with respect to particular matters that were pending under their responsibility during their last year in government.³⁸

A fifth category of ethics restrictions is based on an individual's employment *prior* to joining the government. Two long-standing regulations require a new government employee to recuse herself for one year from participating in any matter involving her former employer if her impartiality could reasonably be questioned,³⁹ and for two years if that employer gave her a payment greater than \$10,000 that may be related to her government position.⁴⁰

³² 5 C.F.R. 2635.808.

³³ 18 U.S.C. § 203 (prohibiting compensation for representational services in matters involving the United States); 18 U.S.C. § 205 (prohibiting representational services in matters involving the United States)

³⁴ 48 C.F.R. § 3.601.

³⁵ 5 C.F.R. 2635.805.

³⁶ 5 C.F.R. 2635.807.

³⁷ The Hatch Act limits the partisan political activities of most executive branch employees, prohibiting them from running for partisan political office. It also prohibits partisan political activities in the government workplace.

³⁸ 18 U.S.C. § 207(a). See also 5 C.F.R. 2641.201. In addition, the EPA prohibits the award of non-competitive contracts to former EPA employees in their first year after leaving the agency, or to firms that are controlled by them or that employ them. 48 CFR 1503.601. The Nuclear Regulatory Commission (NRC) has a similar regulation, but applies for its former employees in the first two years after they leave the commission. 48 CFR 2009.100(a).

³⁹ 5 C.F.R. § 2635.502.

⁴⁰ 5 C.F.R. § 2635.503 (requiring recusal where the payment was "not pursuant to the former employer's established compensation program" and was made former "after the

B. Stricter Ethics Regulation of Employees in Sensitive Positions

In addition to the statutes and regulations that apply to all executive branch employees, the government has imposed additional ethics restrictions on certain classes of employees who are thought to have particularly sensitive positions, such as high-level officials, political appointees, and those involved in treaty negotiation, bank examinations and procurement.⁴¹

Presidential appointees may not accept any gifts from lobbyists,⁴² and full-time noncareer Presidential appointees may not receive any outside earned income.⁴³ Noncareer employees are subject to increased restrictions on their compensation for expressive activities,⁴⁴ and highly paid noncareer employees are limited in the outside earned income they can receive.⁴⁵ In addition, President Obama issued an executive order prohibiting former lobbyists from being appointed to high-level posts in agencies that they had lobbied, and from participating in any matter or on any issue area on which they had lobbied, regardless of whether there is any nexus between their record of lobbying and their governmental duties.

former employer knew that the individual was being considered for a Government position”).

⁴¹ In addition to the ethics statutes and regulations that apply across the entire executive branch, many government agencies have additional restrictions that apply only to employees within this agency. *See* 5 C.F.R. Chapters 21-82. Congress has also enacted some agency-specific restrictions. *See, e.g.*, 47 U.S.C. § 154(b)(2)(A)(ii) (prohibiting all F.C.C. employees from having a financial interest in any company engaged in “the business of communication by wire or radio or in the use of the electromagnetic spectrum”).

⁴² Exec. Ord. No. 13,490.

⁴³ 5 C.F.R. 2635.804(a).

⁴⁴ Noncareer employees are subject to a relatively broad prohibition on receiving compensation for expressive activity, such as teaching, speaking or writing. They may not receive compensation if the expression concerns subject matter, industry or economic sector affected by her agency. 5 C.F.R. 2635.807(a)(2)(i)(E)(3). By contrast, regular employees are subject to a narrower prohibition for such compensation: only if it concerns her agency’s policies or a matter the employee has worked on during the previous year. C.F.R. 2635.807(a)(2)(i)(E)(1), (2).

⁴⁵ These employees are limited to \$26,955 in outside earned income. *See* 5 U.S.C. Appx. § 501(a)(1); 5 C.F.R. §§ 2635.804(b) (limiting outside earned income of covered noncareer employees to 15% of the basic rate of pay for level II of the Executive Schedule), 2636.303(a) (defining “covered noncareer employee”); Exec. Ord. No. 13525, 74 Fed. Reg. 69231 (Dec. 23, 2009) setting the pay for Level II at \$179,700).

The most extensive array of specialized restrictions are post-employment bans, which restrict three types of activities: (1) communicating with current government officials in an attempt to influence them on behalf of others; (2) representing others who seek to influence current government officials; and (3) receiving compensation from particular parties with whom the employee dealt while in government.⁴⁶ A criminal conflict of interest statute imposes two temporary bans on communications:

- a 1-year ban on former high-level officials contacting officials in the agency where they worked in the year prior to leaving government service;⁴⁷ and
- a 2-year ban on former very high-level officials contacting officials in the agency where they worked in the year prior to leaving government service or other high level officials;⁴⁸

and three bans on representation:

- a 1-year ban on former trade or treaty negotiators representing or giving advice concerning such negotiations that occurred during their last year in government;⁴⁹
- a 1-year ban on former high-level officials representing foreign governments and political parties;⁵⁰ and
- a permanent ban on the US Trade Representative and Deputy Trade Representative representing foreign governments and political parties.⁵¹

Two non-criminal statutes restrict certain former employees from accepting compensation from particular parties, including:

- a 1-year ban on former procurement officials' accepting compensation from contractors with whom they did business;⁵² and
- a 1-year ban on former bank examiners' accepting compensation from banks they examined.⁵³

⁴⁶ See Table II for a list of the post-employment restrictions.

⁴⁷ 18 U.S.C. § 207(c). President Obama issued an executive order on his first full day in office requiring Presidential appointees to pledge that they would abide by this ban for two years (rather than the statutorily-required one year). Exec. Ord. No. 13,490, (Jan. 21, 2009).

⁴⁸ 18 U.S.C. § 207(d).

⁴⁹ 18 U.S.C. § 207(b).

⁵⁰ 18 U.S.C. § 207(f).

⁵¹ 18 U.S.C. § 207(f)(2).

⁵² 41 U.S.C. § 423(d).

⁵³ 12 U.S.C. §§ 1820(k), 1786(w).

President Obama required all of his appointees to pledge that they would not lobby any senior executive branch officials after they leave the government until the end of his administration.⁵⁴

C. Looser Ethics Regulation of Temporary Employees

Nearly fifty years ago, when Congress re-wrote the then-existing ethics statutes, it recognized that imposing uniform ethics standards on all government employees could make it difficult for the government to hire experts on a temporary basis.⁵⁵ So the omnibus ethics legislation enacted in 1962 created a new category of federal employee -- “Special Government Employee” (SGE) -- for those who would work for the government on a temporary or intermittent basis: 130 or fewer days in a 12-month period.⁵⁶

As of 2009, the government had 17,600 SGEs.⁵⁷ While Congress created the SGE category so that the government could access individuals with special expertise, at least one government agency uses volunteer SGEs as free labor to leverage its limited resources. The Occupational Safety and Health Administration (OSHA) has recruited over 1100 people to serve as unpaid SGEs to evaluate workplaces.⁵⁸

⁵⁴ Ex. Ord. No. 13,490 (Jan. 21, 2009). President Clinton imposed on his senior political appointees a similar lobbying ban, Ex. Ord. 12834 (Jan. 20, 1993), but rescinded it at the end of his administration. Jason Peckenpaugh, *Clinton Lifts Lobbying Restrictions on Appointees*, GOVT. EXEC. (Jan. 2, 2001).

⁵⁵ Daniel Guttman, *Organizational Conflict Of Interest and the Growth of Big Government*, 15 HARV. J. LEGIS. 297, 303 (1978) (noting that this legislation “facilitat[ed] the Government’s recruitment of persons with specialized knowledge and skills for service on a part-time basis”) (quoting S. Rep. No. 2213, 87th Cong., 2nd Sess. 4 (1962)).

⁵⁶ A Special Government Employee is an “employee of the executive or legislative branch . . . who is retained . . . with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days . . .” 18 U.S.C. § 202(a). The government further divides this group into two categories: those who have worked less than 60 days, and those who will work between 60 and 130 days in a year. Some of the ethics statutes apply only to the latter group of SGEs. See, e.g., 18 U.S. § 207(c) (1-year ban on former senior officials contacting employees of the agency where they worked during their last year in government).

⁵⁷ June 22, 2010 telephone conversation with Dale Christopher, Associate Director, Program Review Division, Office of Government Ethics.

⁵⁸ This program of using volunteer SGEs has enabled OSHA “to leverage [its] limited resources by utilizing private sector safety and health professionals during VPP onsite evaluations.” Policies and Procedures Manual for Special Government Employee (SGE) activity conducted under the auspices of the Occupational Safety and Health Administration’s (OSHA) Voluntary Protection Program, Directive No. CSP-03-01-001

Many ethics restrictions, including the criminal prohibitions on bribery and illegal gratuities, the gift regulations and most of the criminal post-employment restrictions, apply to all SGEs.⁵⁹ Some ethics provisions, such as the ban on compensation for fiduciary services, the limit on outside earned income, the surtax on compensation from private foundations and the option of obtaining of certificate of divestiture to obtain favorable tax treatment for divesting financial holdings, do not apply to SGEs at all. The criminal prohibition on salary supplementation applies only to SGEs who are paid by the government.⁶⁰

Some ethics restrictions, including limits on representational services, award of government contracts, fundraising, service as an expert witness, receiving compensation for expression and certain post-employment activities, apply to SGEs under a narrower range of circumstances than for regular employees. While regular employees may not provide representational services or receive compensation for such services whenever the United States has an interest in the matter, this ban applies to SGEs only if the matter is narrow in scope (i.e., it involves specific parties rather than general policy) and if the SGE actually participated in the matter while in government. If the matter involves not just the government in general but the SGE's agency, then SGEs who are serving more than 60 days are also covered by the representation ban.

While government contracts cannot be awarded to regular government employees, they can be awarded to an SGE unless the

(Jan. 4, 2002) (available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2810&p_text_version=FALSE#1-VIII). The leveraging is literally true. SGEs can outnumber government employees on evaluation teams. *Id.* at Ch. 4, § I.B. List of Active SGEs, available at http://www.osha.gov/dcsp/vpp/sge/active_sges.html. OSHA asserts that these SGEs are subject to the same ethical standards as regular government employees. Policies and Procedures Manual for Special Government Employee (SGE) activity conducted under the auspices of the Occupational Safety and Health Administration's (OSHA) Voluntary Protection Program, Directive No. CSP-03-01-001 (Jan. 4, 2002) (available at http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=2810&p_text_version=FALSE#1-VIII) ("While at an onsite evaluation, an SGE is held to the same ethical and legal standards as a . . . government employee.")

⁵⁹ See Table I (Ethics Restrictions on Executive Branch Employees, SGEs and Contractor Employees) and Table II (Post-Employment Restrictions on Executive Branch Employees, SGEs & Contractor Employees).

⁶⁰ 18 U.S.C. § 209(c). This limited application of the salary supplementation statute makes sense because if an SGE is not receiving any salary from the government, it would be illogical to prevent that SGE from receiving a salary from a non-government entity.

contract arose directly out of the SGE's activities, the SGE was in a position to influence the contract award, or some other conflict of interest exists.⁶¹ While regular executive branch employees are prohibited from serving as an expert witness in any proceeding in which the United States has an interest, that prohibition applies to SGEs only if they have participated in the same matter while in government or, in the case of a proceeding that involves the SGE's agency, to SGEs who are serving more than 60 days, have been appointed by the President, or are serving on a statutorily created commission. While regular employees are prohibited from receiving compensation for expressive activity whenever the subject matter of the expression deals in significant part with her agency's policies or programs,⁶² SGEs are exempted from this restriction.⁶³ While regular employees are prohibited from soliciting charitable contributions from anyone regulated by their agencies,⁶⁴ SGEs are prohibited from soliciting contributions only from those who could be affected by the SGE's own duties.⁶⁵

Two post-employment restrictions apply only to SGEs who have worked more than 60 days within a year: the one-year ban on a former senior official contacting employees of the agency where the employee worked during the previous year, and the one-year ban on a former senior official representing foreign governments and political parties.⁶⁶ Limiting these bans to those who have worked more than 60 days may be justified by a theory that those with less experience in government are less apt to be in a position to inappropriately influence their former government colleagues or less apt to have confidential information that could be passed on to foreign governments.

One of the ways that the federal government obtains advice from experts is by appointing them to serve on advisory committees. Advisory committees consist of individuals from diverse backgrounds who bring their own expertise, experience and perspective to address

⁶¹ 48 C.F.R. § 3.601(b).

⁶² 5 C.F.R. 2635.807(a)(2)(i)(E)(2).

⁶³ 5 C.F.R. 2635.807(a)(2)(i)(E)(4). SGEs who are in noncareer positions are also exempted from the broader restriction on receiving compensation for expression related to her agency's general subject matter or industry. *Id.* The prohibition on compensated expression that deals with specific matters also has more limited application to SGEs. *Id.*

⁶⁴ 5 C.F.R. § 2635.808(c)(1)(i).

⁶⁵ 5 C.F.R. § 2635.808(c)(1)(ii).

⁶⁶ 18 U.S.C. § 207(c)(2)(B).

particular policy problems and provide advice to policy-makers.⁶⁷ The members' individual perspectives could be conceived of as conflicts of interest, but the government accommodates – rather than eliminates – those conflicts of interest. In the Federal Advisory Committee Act (FACA), Congress mandated that committee membership must “be fairly balanced in terms of the points of views represented,” and that members must disclose conflicts of interest.⁶⁸

The criminal prohibition on financial conflicts of interest does not apply to SGEs who serve on advisory committees if certain criteria are met, such as if they are dealing with matters that are broad in scope (i.e. involving policy rather than particular parties) and if it would affect the SGE or her employer in the same way it would affect other similarly situated individuals or entities.⁶⁹ In addition, an agency official can waive the conflict if she determines that the need for the SGE's services on the advisory committee outweighs the conflict.⁷⁰

The modified ethics restrictions for SGEs demonstrate that government ethics regulation need not involve an all-or-nothing approach. The government can protect its ethical concerns while accommodating its other interests, including its need to obtain expertise on a temporary basis.

D. Implementation of Ethics Standards

The government implements these substantive restrictions by requiring some employees to disclose their financial interests and then reviewing those disclosures for conflicts, by facilitating divestment of assets that would cause conflicts, by giving employees ethics training and advice, by investigating alleged ethics violations, and by disciplining or prosecuting employees who have violated them.

⁶⁷ The Federal Advisory Committee Act also permits the appointment of “representative” members who are supposed to represent particular industries or interest groups. Such “representative” members are not considered government employees at all, and are not subject to the conflict of interest or disclosure requirements. See Office of Government Ethics, Op. 82x22 (Memorandum dated July 9, 1982 from J. Jackson Walter Director of the Office of Government Ethics to Heads of Departments and Agencies of the Executive Branch regarding Members of Federal Advisory Committees and the Conflict-of-Interest Statutes); Office of Government Ethics, Letter to the Chairman of a National Commission dated June 24, 1993, 1993 OGE LEXIS 510.

⁶⁸ 5 U.S.C. Appx. § 5(b)(2).

⁶⁹ 5 C.F.R. 2640.203(g).

⁷⁰ 18 U.S.C. § 208(b)(3).

The government's largest investment in ethics implementation is the financial disclosure process. Every year, approximately 25,000 employees must submit public financial disclosure forms,⁷¹ and about 300,000 additional employees must submit confidential financial disclosure forms,⁷² revealing information about their income, assets, liabilities,⁷³ gifts, travel reimbursements, and employment and business affiliations.⁷⁴

All SGEs must file financial disclosure statements, although most of them are subject only to confidential (rather than public) financial disclosures.⁷⁵ Some SGEs who would ordinarily be required to file public financial disclosure forms because of the significance of their position can file confidential disclosures instead if they will serve less than 60 days, if the agency head certifies that there is a special need for their services, or if they serve in the White House with a Presidential appointment or commission.

Once the employees submit their disclosure forms, agency officials then review their forms to check for compliance with ethics standards. When these reviews reveal financial conflicts, employees generally have the option of recusing themselves from participating in matters that could affect their finances or divesting themselves of those assets that would otherwise cause the conflict. Since divesting may result in capital gains tax, Congress enacted a special program (a "certificate of divestiture") to relieve this tax burden.⁷⁶

The Office of Government Ethics provides formal advice about the application of ethics standards, publishing legal opinions about ethics statutes and regulations on a regular basis.⁷⁷ In addition, each agency has

⁷¹ August 4, 2010 email to author from Dale Christopher, Associate Director, Program Review Division, Office of Government Ethics.

⁷² August 4, 2010 email to author from Dale Christopher, Associate Director, Program Review Division, Office of Government Ethics.

⁷³ Filers must report loans over \$10,000, except those from financial institutions granted on terms made available to the general public.

⁷⁴ See OGE Form 450, Confidential Financial Disclosure Report, and SF 278, Public Financial Disclosure Report. Public filers must also disclose transactions of real property and securities. *Id.*

⁷⁵ 5 C.F.R. § 2634.904(a)(2) (requiring SGEs to file confidential disclosures); See also 5 C.F.R. §§ 2634.202(h); 2634.204; 2634.205 (exempting certain SGEs from public disclosure requirements).

⁷⁶ The option of obtaining a certificate of divestiture is not available to Special Government Employees. 26 U.S.C. § 1043(b)(1)(A).

⁷⁷ 5 U.S.C. app. § 402(b)(8).

a Designated Agency Ethics Officer who counsels agency employees on ethics issues.⁷⁸ Government agencies must provide information about ethics standards to all new employees,⁷⁹ and must provide at least one hour of ethics training annually to presidential appointees, White House employees, contracting officers,⁸⁰ and all other employees who are required to file public or confidential financial disclosure reports.⁸¹ In general, Congress mandates that advice be available to employees and former employees, who may choose whether or not to seek it.⁸² But a 2008 statute *requires* former high-level or procurement officials from the Defense Department (DoD) to seek a written legal opinion from a DoD ethics official before receiving compensation from a DoD contractor within 2 years of leaving the department.⁸³

II. Principles Underlying Government Ethics Restrictions

The extensive array of ethics restrictions described above has more in common with the tax code than the Ten Commandments or the Golden Rule. As such, some observers have criticized these restrictions as being so complicated that they lack the moral authority that one would hope for in an *ethics* code. Nonetheless, even within this complexity, one can discern four distinct principles that motivate these many provisions: (1) preventing government employees from abusing the fiduciary nature of public office; (2) the related goal of promoting public confidence in government; (3) maintaining Congressional and executive branch control of federal workers; and (4) ensuring that officials devote adequate attention to their responsibilities. In addition, some ethics restrictions appear to be motivated not by a principle, as such, but simply by a desire to favor or disfavor particular groups or activities.

⁷⁸ 5 C.F.R. 2638.203(b)(7).

⁷⁹ 5 C.F.R. 2639.703.

⁸⁰ 5 C.F.R. 2639.705(a).

⁸¹ 5 C.F.R. §§ 2639.704(a), 2639.705(a). For SGEs who are expected to work 60 or fewer days and SGEs who must file public financial disclosures, agencies can provide written training materials instead of one hour of training. 5 C.F.R. §§ 2639.704(e), 2639.705(d).

⁸² By regulation, when a current or former employee seeks advice from an ethics official about whether her acceptance of compensation from a contractor would violate 41 U.S.C. § 423(d), the ethics official must provide a response within 30 days, and the employee and contractor can rely on the ethics official's advice. FAR 3.104-6(d).

⁸³ National Defense Authorization Act of Jan. 28, 2008, P.L. 110-181, Div A, Title VIII, Subtitle D, § 847, 121 Stat. 243.

The principle that underlies most of these restrictions is the fiduciary nature of public office: the idea that public office is a public trust. A fiduciary is someone who can exercise discretion or has access to resources, but must use that discretion or access on behalf of a beneficiary rather than for herself or some third party.⁸⁴

Government officials are in a position of trust in that they can exercise discretion and/or have access to resources, but they must use that power and those resources on behalf of someone other than themselves. For more than a century, courts have recognized and enforced government officials' fiduciary obligations even in the absence of any specific statutory or regulatory codification of that obligation.⁸⁵

⁸⁴ See Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 309 (1989) (discussion discretion- and access-based fiduciary relationships). The precise identity of the government official's beneficiary is a matter of some contention, with possibilities including the nation, the government itself, and the public. See parallel discussion of identifying the client of government lawyers. Kathleen Clark, *Government Lawyers and Confidentiality Norms*, WASH. U. L. REV. (2007). What matters here is that a government official must act on behalf of someone other than herself, and thus can be said to owe fiduciary duties.

The power may involve making a decision or giving advice to a decision-maker. Much is made of this distinction – between decision-making and giving advice – in the policy and legal debates over government contracting because contractors are not supposed to make decisions exercising governmental authority. Office of Management and Budget, Policy Letter 92-1, *Inherently Governmental Functions*. Despite this prohibition on contractors' making decisions, one can find many examples of contractors doing exactly this. Committee on Governmental Affairs, U.S. Senate, *Oversight of the Structure and Management of the Department of Energy*, Staff Report, 96th Cong., 2nd Sess. (Dec. 1980); Subcommittee on Federal Services, Post Office, and Civil Service, Committee on Governmental Affairs, U.S. Senate, *Use of Consultants and Contractors by the Environmental Protection Agency and the Department of Energy*, S. Hrg. 101-554 (Nov. 6, 1989).

This distinction (between making decisions and giving advice) is irrelevant to fiduciary analysis because both the decision-maker and the advice-giver have an obligation to act on behalf of the intended beneficiary rather than herself or another private party. See, e.g., 18 U.S.C. 208(a) (prohibiting anyone who "participates personally and substantially as a Government . . . employee, through . . . the rendering of advice . . . in [a] particular matter" from having a financial interest in the matter. Compare Office of Legal Counsel, *Applicability of the Emoluments Clause to Nongovernmental Members of ACUS* (June 3, 2010) (Constitution's Emoluments Clause prohibiting "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State," does not apply to nongovernmental members of the Administrative Conference because although they give advice, they do not exercise governmental authority).

⁸⁵ Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 74 (1996).

As the following discussion makes clear, Congress and the executive branch have also recognized the fiduciary nature of governmental power by enacting statutes and regulations that reflect employees' fiduciary duties.⁸⁶

Three aspects of the fiduciary obligation are particularly relevant to government officials. First, the norm against conflicts: a fiduciary must not place herself in a position where her own interest conflicts with her duty toward a beneficiary. Second, the norm against misusing resources: a fiduciary must use the beneficiary's assets to benefit the beneficiary rather than to benefit herself or another party. Third, the norm of impartiality: a fiduciary who allocates benefits among beneficiaries must treat beneficiaries of the same class equally and beneficiaries of different classes fairly.⁸⁷

The fiduciary norm against conflicts is implicated whenever a fiduciary could personally benefit from a decision she makes or advice that she gives on behalf of a beneficiary. The anti-conflict norm is reflected in many of the restrictions on outside payments to government employees. These fiduciary-based restrictions include limits on gifts and payments from those who could be affected by an employee's duties,⁸⁸ criminal prohibitions on bribes and gratuities related to government work,⁸⁹ and restrictions on participation in matters that could affect an employee's own financial interest or that of party whose interests are imputed to her (such as a family member, an organization with which she is affiliated, or of a party with whom she is negotiating for future employment).⁹⁰

The fiduciary norm against misuse of resources is explicitly reflected in restrictions on using public office for private gain,⁹¹ using government time for private purposes,⁹² using government position for fundraising or electioneering, and restrictions on partisan political activities in the workplace. It is implicit in the restrictions on accepting

⁸⁶ See, e.g., 5 CFR 2635.101(a) ("Public service is a public trust.").

⁸⁷ Robert Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 311 (1989) (requirement that fiduciaries not trust property or confidential information included in the conflict component); Kathleen Clark, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57, 71 (1996).

⁸⁸ 5 U.S.C. § 7353(a)(2).

⁸⁹ 18 U.S.C. § 201.

⁹⁰ 18 U.S.C. § 208.

⁹¹ 5 CFR 2635.702.

⁹² 5 CFR 2635.705.

gifts from subordinates⁹³ and the anti-nepotism rules.⁹⁴ The fiduciary norm of impartiality is reflected in regulations that prohibit employees from giving preferential treatment.⁹⁵

Often a fiduciary has access to confidential information in order to conduct her duties for a beneficiary, and the fiduciary duty requires that she use that confidential information only to further the beneficiary's interest rather than those of herself or someone else. This fiduciary duty is reflected in the regulatory restriction on using government information for personal gain.⁹⁶ The fiduciary duty not to misuse information continues even after the relationship has ended. The continuing duty to protect information is reflected in an ethics statute that prohibits the disclosure of sensitive procurement information,⁹⁷ and may be reflected in some of the post-employment restrictions.⁹⁸

The third key aspect of fiduciary duty – treating beneficiaries in the same class equally and beneficiaries in different classes fairly – is also reflected in government ethics regulations. One can find explicit expression of this norm in the regulation setting out the general principles of government service, requiring employees to “act impartially and not give preferential treatment to any private organization or individual.”⁹⁹ This principle may also be implicit in other regulations, such as the prohibition on hiring relatives.¹⁰⁰

While the restrictions described above directly express fiduciary norms, other restrictions are quasi-fiduciary in nature. They reflect a fiduciary-like concern, but they use a proxy, often broadening the scope of the restriction. For example, the direct fiduciary restriction on gifts prohibits employees from accepting gifts from anyone who could be affected by their duties.¹⁰¹ A broader proxy-based restriction prohibits an employee from accepting a gift from anyone who is regulated by her agency.¹⁰² These broader, proxy-based restrictions prevent the higher-order effects created by an environment in which a regulated company

⁹³ 5 CFR 2635.302(a)(1).

⁹⁴ 5 U.S.C. § 3110(b).

⁹⁵ *See, e.g.*, 5 C.F.R. 2635.101(a)(8).

⁹⁶ 5 CFR 2635.703.

⁹⁷ 41 U.S.C. § 423(a).

⁹⁸ See discussion below.

⁹⁹ 5 CFR 2635.101(b)(8).

¹⁰⁰ 5 U.S.C. § 3110(b).

¹⁰¹ 5 U.S.C. § 7353(b).

¹⁰² 5 U.S.C. § 7353(a).

can give gifts to the employees of the agency that regulates it, even if not to the officials directly regulating it.¹⁰³ Another example of a quasi-fiduciary restriction is the government's ban on employees' accepting gifts from any other employee of lower salary.¹⁰⁴ This regulation uses salary is a proxy for subordinate position. The government also limits the partisan political activities of civil servants not just in the workplace but also outside the workplace. These regulations prohibit employees from soliciting campaign donations for partisan political candidates. While such outside activities would not necessarily cause a civil servant to act in a partisan manner in the workplace, banning those activities helps to insulate the civil service from partisanship, preventing the creation of a partisan culture that would undermine both the impartiality and the appearance of impartiality in decisions made by such civil servants.

Other quasi-fiduciary restrictions include the bans on representing private parties in disputes with the government (and on accepting compensation for such representation). These bans grew out of experiences during the nineteenth century, when government officials exploited their positions to assist outsiders with claims against the federal government. Rather than fashioning a narrowly tailored ban on employees' inappropriately exploiting their position, Congress enacted a broad ban on any employee representing those with any claims against the federal government. This criminal ban on representation reflects a legitimate fiduciary concern: the misuse of government position. But it is also much broader than what would strictly be necessary to prevent inappropriate exploitation of government position. Thus, the representation ban is but one illustration of the inexact proxies that the government uses in ethics restrictions. Rather than applying to just those employees who could use their government position to aid private parties with claims against the government, the ban applies to all employees, regardless of their position.

Similar concerns motivate the bans on employees' serving as an expert witness for such parties¹⁰⁵ and being awarded government

¹⁰³ See Department of Interior Inspector General, Investigative Report: Island Operating Company *et al.* (2010) (employees of the Mineral Management Service accepted gifts of travel and football tickets from oil and gas company employees).

¹⁰⁴ The use of such proxies is not without criticism. See PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR (1989).

¹⁰⁵ 5 CFR 2635.805.

contracts. Whether these activities would constitute a violation of a government official's fiduciary obligation would depend on a close examination of the particular facts: was the employee exploiting confidential information or her government position on behalf of a private party or herself? The government has dispensed with this kind of fact-specific inquiry by enacting broader, proxy-based restrictions.¹⁰⁶

The ethics statutes and regulations are not pure or perfect expressions of fiduciary concerns. They often use inexact proxies rather than addressing directly the potential harm. For example, high-level officials and political appointees are subject to stricter regulation of their outside activities, their acceptance of gifts, and their post-government employment. These tighter restrictions may reflect a judgment that such employees may exercise greater discretion and thus could more severely damage the government through the improper exercise of that discretion. Employees who are expected to work less than six months are subject to fewer restrictions, and those expected to work less than three months are subject to even fewer.¹⁰⁷ This may reflect both the presumption that temporary employees are less likely to exercise broad discretion and the concern that imposing a broad swath of ethics restrictions on them would make them less likely to agree to serve. The ethics rules' imperfect expression of fiduciary duty may reflect the government's need to accommodate other values, such as the need to obtain expertise on a temporary basis or the desire to permit fluidity in the flow of personnel in and out of government.¹⁰⁸

The fiduciary norms against conflicts, misuse of resources and partiality can explain most government ethics restrictions, but not all of them. A second principle that can help explain some ethics restrictions is the desire to promote public confidence in government.¹⁰⁹ This appears to be the primary motivation for the government's varied post-

¹⁰⁶ Another example of a proxy is the government's decision to restrict compensation for certain outside activities (such as teaching) rather than restricting the outside activity itself. PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR (1989).

¹⁰⁷ See Table II.

¹⁰⁸ See Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57 (1992).

¹⁰⁹ This principle – promoting public trust – is not entirely independent of fiduciary theory because fiduciary-based restrictions also generally promote public confidence in government. But some government ethics restrictions (including some post-employment bans) cannot be explained by fiduciary theory, and seem instead aimed at promoting confidence. Many post-employment restrictions fall into this category.

employment restrictions, a seemingly ad hoc collection of temporary and permanent bans former government employees communicating with some or all federal officials on behalf of others;¹¹⁰ providing representation or advice on particular topics (e.g., treaty negotiations);¹¹¹ assisting certain parties (e.g., foreign governments and political parties);¹¹² and receiving compensation from parties that they could have affected while in government.¹¹³

At first glance, some of these post-employment restrictions (such as the bans applicable to particular matters in which a government employee participated personally and substantially or which was under the employee's responsibility) may appear to be aimed at preventing the misuse of a government resource, confidential information. But these bans on communications with government officials do not prohibit former employees from disclosing or using confidential information, and such employees remain free to give advice behind-the-scenes. While Congress included a ban on such advice in the 1978 Ethics in Government Act, it repealed that provision before it went into effect after many argued that it would prevent appropriate fluidity between the government and the private sectors.¹¹⁴

One way that post-employment bans may promote public confidence is by ensuring that former high-level officials cannot misuse the relationships that they may have developed while in office. For example, a criminal statute imposes a temporary ban on former high-level employees contacting certain government officials, regardless of

¹¹⁰ 18 U.S.C. § 207(a).

¹¹¹ 18 U.S.C. § 207(b).

¹¹² 18 U.S.C. § 207(f). See also discussion *infra*.

¹¹³ 41 U.S.C. § 423(d) (1-year ban on former procurement officials accepting compensation from contractors with whom they did business); 12 U.S.C. §§ 1820(k), 1786(w) (1-year ban on former bank examiners accepting compensation from banks they examined).

¹¹⁴ OFFICE OF GOVERNMENT ETHICS, REPORT TO THE PRESIDENT AND TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 14 (2006).

The legal ethics rule on former government officials more closely tracks the fiduciary concern with protecting confidential information, prohibiting lawyers who are former government officials from representing someone on a matter they worked on while in government. American Bar Association Model Rule 1.11(a). See also Model Rule 1.11(c) (prohibiting representation where the former government official had access to confidential government information that could be used to the detriment of another party).

whether there is any factual nexus between their former government work and the matter they are now handling.¹¹⁵ Similarly, President Obama has banned all of his Presidential appointees who leave office from lobbying any high-level officials for the duration of his administration.¹¹⁶

A third principle behind ethics restrictions is the goal of maintaining Congressional and executive branch control of federal workers. For example, restrictions on salary supplementation and on agencies' acceptance of volunteer services reflect Congress's desire to control the conduct of government operations through its appropriations power.¹¹⁷ A fourth goal is to ensure that workers devote adequate attention to their duties. The limits on outside earned income for certain high-level appointees appear to promote this goal, ensuring that these officials are not distracted by other professional duties.¹¹⁸ Here, Congress has used money as a proxy for the time that an employee would devote to that other job.

Some ethics restrictions seem to be motivated not by principle but by a desire to favor or disfavor particular groups or activities. The criminal post-employment statutes favor colleges, universities, nonprofit hospitals and research organizations by exempting them from many of the bans on communication and representation.¹¹⁹ They disfavor foreign governments and political parties, prohibiting former high-level officials from representing them regardless of whether there is any nexus between that representation and their former government duties.¹²⁰ This disfavoring of foreign governments has a long history, from the Constitution's ban on certain government officials accepting gifts or honorary titles from foreign nations to a 1967 statute prohibiting all government employees from accepting gifts from foreign governments.¹²¹

¹¹⁵ 18 U.S.C. § 207(d).

¹¹⁶ Ex. Ord. 13490 (Jan. 21, 2009), 74 Fed. Reg. 4673.

¹¹⁷ Beth Nolan, *Public Interest, Private Income: Conflicts and Control Limits on the Outside Income of Government Officials*, 87 NW. U. L. REV. 57 (1992).

¹¹⁸ 5 C.F.R. 2635.804(a); 5 U.S.C. Appx. § 501(a)(1); 5 C.F.R. §§ 2635.804(b).

¹¹⁹ 18 U.S.C. § 207(j)(2)(B).

¹²⁰ 18 U.S.C. § 207(f). Another example of an ethics restriction aimed at disfavoring particular parties is the statutory ban on accepting gifts from foreign governments. 5 U.S.C. § 7342.

¹²¹ U.S. CONST. art. I, § 9, cl. 8 ("No person holding any Office of Profit or Trust . . . shall, without the Consent of the Congress, accept of any present . . . of any kind whatever, from any King, Prince, or foreign State."); 5 U.S.C. § 7342.

Another group that has been disfavored by the Obama administration's ethics reforms is lobbyists. On his first full day in office, President Obama issued an executive order severely restricting registered lobbyists' ability to become political appointees.¹²² He later issued a memorandum limiting registered lobbyists' ability to communicate with executive branch officials regarding the Recovery Act, requiring any such communications about particular projects to be in writing rather than oral,¹²³ and instructed agency heads not to appoint registered lobbyists to advisory committees, boards or commissions.¹²⁴

In singling out lobbyists for disfavored treatment, President Obama has invoked the populist rhetoric of "reducing the undue influence of special interests."¹²⁵ These anti-lobbyist initiatives may be aimed at preventing biases that are based not on an individual's current financial interests but on the individual's past associations. Even so, these measures are both underinclusive and overinclusive. They are underinclusive in that they do not cover someone like former Senator Tom Daschle, who advised special interests on public policy and legislative initiatives, but did not communicate on their behalf, and thus did not have to register as a lobbyist.¹²⁶ They are overinclusive because they cover not just those lobbyists who have worked for moneyed "special interests," but also those who lobbied for human rights and for children in foster care.¹²⁷

¹²² Executive Order 13,490, 74 Fed.Reg. 4673 (Jan. 21, 2009) (2-year ban on registered lobbyists seeking or accepting a political appointment in an agency they lobbied; participating in the specific issue area they lobbied; and participating in any particular matter on which they lobbied). The Executive Order does not define "specific issue area," so the scope of this prohibition is unclear.

Even as a Presidential candidate, Barack Obama refused to accept political donations from registered lobbyists. See Obama Returns Lobbyists' Donations, April 14, 2007 (available at <http://thecaucus.blogs.nytimes.com/2007/04/14/obama-returns-lobbyists-donations/>).

¹²³ Presidential Memorandum re: Recovery Act Funds (March 20, 2009).

¹²⁴ Presidential Memorandum--Lobbyists on Agency Boards and Commissions (June 18, 2010).

¹²⁵ Presidential Memorandum--Lobbyists on Agency Boards and Commissions (June 18, 2010).

¹²⁶ Michael Scherer, *Daschle's Problems: When is a Lobbyist Not a Lobbyist?*, TIME, Feb. 3, 2009.

¹²⁷ Jonathan Martin, *Lobbyist ban limits Obama's options*, POLITICO, March 13, 2009; Peter Baker, *Nonprofit Groups Seeking Exceptions to Lobby Rule*, N.Y. TIMES, April 21, 2009.

III. Government Service Contracting: A \$268 Billion Sector of Government Spending

In the last two decades, federal government spending has expanded, nearly doubling from \$1.4 trillion in FY 1992 to \$2.7 in FY 2007.¹²⁸ With the additional spending, agencies are required to perform more tasks and are given additional funding to perform those tasks, but they have not hired additional employees to accomplish that work. In fact, Congress has placed limits on the size of the federal employee workforce, and the number of government employees has actually decreased.¹²⁹ The number of civilian executive branch employees has fallen by one-seventh.¹³⁰

Agencies are meeting these additional performance requirements by expanding their use of contractors to perform services.¹³¹ These services range from the mundane, such as hauling trash or cleaning government offices, to the sophisticated, such as advising the government on how to respond to climate change or the economic crisis.

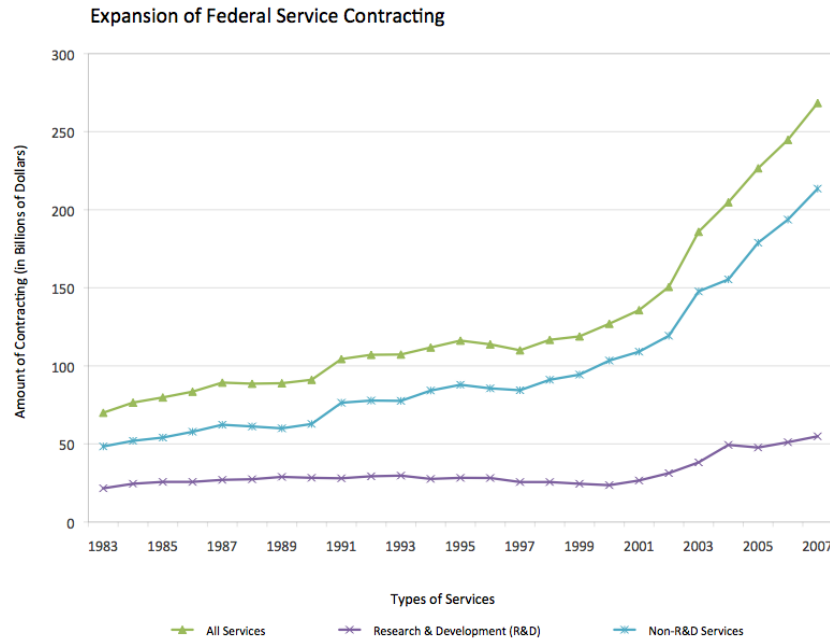
¹²⁸ Table 1.1 — Summary of Receipts, Outlays, and Surpluses or Deficits (-): 1789–2015, Budget of the United States Government: Historical Tables Fiscal Year 2011 (available at <http://www.gpoaccess.gov/usbudget/fy11/hist.html>). Note that these figures are not adjusted for inflation.

¹²⁹ GAO, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 5 (2008) (noting the ceilings on the authorized number of government employees have contributed to the government's increased reliance on contractors).

¹³⁰ The civilian workforce fell from 2.2 to 1.8 million. Table 17.1 — Total Executive Branch Civilian Full-Time Equivalent (FTE) Employees, 1981–2011, Budget of the United States Government: Historical Tables Fiscal Year 2011. These figures for the civilian workforce do not include military and postal service employees. The total number of executive branch employees (including members of the military and postal service) fell 2 per cent in the same time period, from 4.2 to 4.1 million. See Office of Personnel Management, Total Government Employment Since 1962 (available at <http://www.opm.gov/feddata/HistoryTables/TotalGovernmentSince1962.asp>).

¹³¹ In addition to contracts, the government also uses grants and mandates to accomplish its goals while avoiding any increase in the number of government employees. See Donald F. Kettle, *After the Reforms*, GOVT. EXEC. 38 (April 1998) (“The federal government . . . does relatively little itself. . . . [I]t does most of its work through contracts with the for-profit and not-for-profit sectors, grants to state and local governments, special provisions in the tax code, and regulations on corporate and individual behavior.”).

Contractor employees are now performing many of the tasks that in the past had been performed by government employees.¹³² As the number of



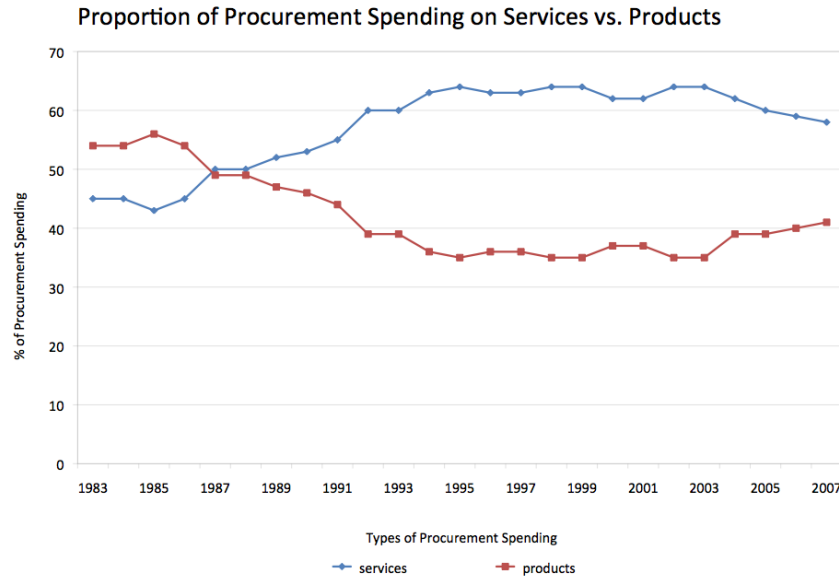
government employees has decreased, the amount of government service contracting has increased, more than tripling from \$70 billion in FY 1983 to \$268 billion in FY 2007.¹³³ (See Figure: Expansion of Federal Service

¹³² See PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (2008); JANINE R. WEDEL, *SHADOW ELITE: HOW THE WORLD'S NEW POWER BROKERS UNDERMINE DEMOCRACY, GOVERNMENT, AND THE FREE MARKET* (2009). For a discussion of outsourcing in foreign affairs and defense, see ALLISON STANGER, *ONE NATION UNDER CONTRACT: THE OUTSOURCING OF AMERICAN POWER AND THE FUTURE OF FOREIGN POLICY* (2009); PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* (1999). Laura A. Dickinson, *Public Law Values in a Privatized World*, *YALE J. INTL. L.* 383 (2006).

¹³³ This report focuses on the government's service contracts, as opposed to its contracts for supplies. Service contracts "directly engage[] the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply." 48 CFR 37.101. Note that these figures are not adjusted for inflation.

Emblematic of the contracting out of so many government functions, in 2003 the federal government contracted out the creation of its reports on contracting, the Federal Procurement Data System, to a private contractor, Global Computer Enterprises,

Contracting.) In an earlier era, most of the government's contracts were for products. Now most of the government's contracts are for services. (See Figure: Proportion of Procurement Spending on Services v. Products.)



The government can either contract directly with an individual or with a company that then subcontracts with individuals or hires them as employees. The government's use of service contracts has proven controversial in both the Treasury Department and the Defense Department. For example, the Treasury Department used the former technique to obtain the services of Dan Jester, the former Goldman Sachs official described in this report's introduction who was Treasury's point person on the AIG bailout.¹³⁴ The Army, Navy and Air Force have used

Inc., a company that has a ".gov" website (www.fpds.gov). See FY 2007 Federal Procurement Report at 3.

¹³⁴ Karen Weise, *Treasury's 'Point Man' on AIG Bailout That Benefited Goldman, Owned Goldman Stock*, Pro Publica, June 30, 2010 (<http://www.propublica.org/article/treasurys-point-man-on-aig-bailout-that-benefited-goldman-owned-goldman-sto>). Jester received \$30,000 from Treasury for his services. See

<http://www.usaspending.gov/search?query=jester&searchtype=JTI1N0VmcSUyNTNEJT11MjhNYWpvckFnZW5jeSUyNTNBKiUyNTIxKkRlcGFydG11bnQlMjUyMG9mJTI1MjB0aGUlMjUyMFRyZWZzdXJ5KiUyNTIxKiUyNTI5>. For further discussion of

the latter technique to obtain the services of retired flag officers and civilian officials in “mentoring” and giving advice to current officers.¹³⁵ In some cases, these retired officers who were advising the military on operations had financial ties to companies that sell products designed to aid those same operations.¹³⁶ By using these contracts, the government avoids application of almost all the ethics restrictions described above. As a Defense Department official has explained, “one reason that mentors are not hired as employees is so they . . . have freedom from the government ethics bureaucracy. . . . The ethics rules constrain [government employees’] ability to consult for private companies.”¹³⁷

In some cases, an agency contracts with an entity to perform one discrete task (such as performing a study), and the entity then uses its own personnel to perform that task on its own premises away from a government office.¹³⁸ That is the traditional model, and it describes how many government service contractors operated up until the mid-1990s.

But in the last two decades, much of service contracting has followed a different model, known as “staff augmentation” or colloquially referred to as “body shops.”¹³⁹ Body shops are companies that supply the government with laborers (“bodies”) to work in government offices, side-by-side with government employees, and often to perform exactly the same tasks as government employees.¹⁴⁰

Treasury’s use of contractors in response to the financial crisis, see Kathleen Clark, *Conflicts of Interest in Bailout Contracting: Unlearned Lessons from the S&L Bailout*, U. MINN. L. REV. (forthcoming 2011).

¹³⁵ Tom Vanden Brook, Ken Dilanian and Ray Locker, *How Some Retired Military Officers Became Well-Paid Consultants: Retired Military Officers Cash in as Well-Paid Consultants*, USA TODAY, Nov. 18, 2009 (Joint Forces Command obtained mentoring services of retired flag officers by contracting with Northrop Grumman, which then hired mentors as subcontractors). The Marines contracted directly with the retired officers. *Id.*

¹³⁶ *Id.* (mentors with financial ties to companies selling products designed to aid particular launch operations from ships gave advice on exercises related to such launch operations). Up until 2010, there were no requirements that the retired flag officers disclose their financial ties to defense contracts and no restriction on their using the information they learn on behalf of those contractors. The Defense Department did not even collect information about these retired officers’ business affiliations. *Id.*

¹³⁷ *Id.* (quoting Brig. Gen. John R. “Bob” Ranck).

¹³⁸ See text accompanying note 135 (discussing Defense Department’s contract with the Institute for Defense Analyses (IDA) to analyze the F-22 jet fighter program).

¹³⁹ Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?* 33 PUB. CONT. L.J. 263, 291 (2004).

¹⁴⁰ The literature on contracting refers to this phenomenon as the multi-sector or blended workforce.

Agencies contract with body shops to supply the labor that the agency will not or cannot hire directly, and the contractor employees engage in functions that are central to the government's functioning, such as defining and managing project resources, developing briefings, financial plans and budgets, evaluating and managing programs, advising on the selection of contractors, "making trade-off decisions among costs and capabilities,"¹⁴¹ and conducting management oversight.¹⁴²

The shortage of government employees is so severe, in fact, that the government is now contracting out the contracting-out function: advising the government on how to deal with other contractors, including developing requests for proposals, evaluating contractors' proposals, estimating costs, determining the fees that other contractors can earn, developing criteria for evaluating other contractors' work, conducting those evaluations, and identifying the government's and other contractor's liabilities.¹⁴³ The government refers to this as contractors involved in the acquisition function.¹⁴⁴ I refer to this as "meta-contracting."¹⁴⁵ Not surprisingly, this meta-contracting area is rife with

¹⁴¹ Government Accountability Office, Defense Acquisitions: DOD's Increased Reliance on Service Contractors Exacerbates Long-standing Challenges (Statement of David M. Walker, Comptroller General of the United States), Jan. 23, 2008, at 1, 4.

¹⁴² GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 45-46 (2008).

Much of the public debate on government contracting has centered on whether the government has contracted out "inherently government functions." In theory, the government may not contract out such functions. In general, the exercise of government authority constitutes an "inherently governmental function," but giving advice about how such authority should be exercised and assisting someone who exercises that authority do not. Office of Management and Budget, Policy Letter 92-1, Inherently Governmental Functions, 57 Fed.Reg. 45096 (Sept. 30, 1992); Office of Management and Budget, Work Reserved for Performance by Federal Government Employees, 75 Fed.Reg. 16188 (March 31, 2010). This report sidesteps the debate over "inherently government functions," because both those who exercise government authority and those who give advice or have fiduciary obligations and should be subject to ethics restrictions.

Another key issue is whether the government has contracted for personal services even where not authorized by statute. See 48 C.F.R. 37.104(b). This is an empirical question that deserves further study. See *infra* Section VI.

¹⁴³ *Id.*

¹⁴⁴ This includes evaluating the work of other contractors, helping design requests for proposals, and giving the government advice about how "to acquire desired capabilities." *Id.* at 8 (2008).

¹⁴⁵ It is important to distinguish meta-contracting, where a contractor gives the government advice about how to handle current or future contracts, from subcontracting,

the potential for conflicts of interest. It is one of the first areas of contracting that has been subjected to personal conflict of interest analysis, as discussed the next section.

The government does not know how many contractor (and subcontractor) employees perform services for it. Secretary of Defense Robert Gates recently made the “terrible confession” that he was unable to determine how many contractors were working for him -- not in the Defense Department as a whole, but in the Office of the Secretary of Defense itself.¹⁴⁶

While we have reliable data on the amount of money that the government spends on service contracts, we do not have reliable data on the number of individuals providing those services. Paul Light has asserted that federal contractor employees outnumber government employees by a factor of 1.8 to 1,¹⁴⁷ but his estimate includes not just jobs at contractors, but also jobs created *indirectly* through contract spending, such as jobs at the grocery stores and dry cleaners that serve contractor employees.¹⁴⁸ The Defense Department reported that nearly 600,000 contractor employees provided services in FY 2008, but the GAO determined that the Defense Department’s methodology was flawed, underestimating the actual number.¹⁴⁹ Congress is considering

where a contractor engages another company to accomplish part of the task that it has agreed to accomplish for the government.

¹⁴⁶ Dana Priest and William M. Arkin, *National Security, Inc.*, WASH. POST, July 20, 2010. (“‘This is a terrible confession,’ [Gates] said. ‘I can’t get a number on how many contractors work for the Office of the Secretary of Defense,’ referring to the department’s civilian leadership.”).

¹⁴⁷ In 2005, there were 7.5 million federal contractor employees, PAUL LIGHT, THE TRUE SIZE OF GOVERNMENT. That same year, the Office of Management and Budget reports that there were 4.1 million executive branch employees, including those serving in the military and postal service. Office of Personnel Management, Total Government Employment Since 1962 (available at <http://www.opm.gov/feddata/HistoricalTables/TotalGovernmentSince1962.asp>).

¹⁴⁸ PAUL C. LIGHT, THE TRUE SIZE OF GOVERNMENT 22 (1999). Light explains that his methodology begins with the dollar figures reported in the FPDS, considers the Standard Industrial Code (SIC) associated with each contract, and then uses the “job multipliers supplied by the Bureau of Economic Analysis [BEA] input-output model of the economy.” *Id.* at 19; August 20, 2101 telephone conversation with Paul Murphy, who conducted the research for Paul Light).

¹⁴⁹ The National Defense Authorization Act for FY 2008 required DoD to report on the number of contractor employees providing services. 10 U.S.C. § 2330a(c) GAO, DEFENSE ACQUISITIONS: OBSERVATIONS ON THE DEPARTMENT OF DEFENSE SERVICE CONTRACT INVENTORIES FOR FISCAL YEAR 2008 (Jan. 29, 2010).

legislation to require each agency in the executive branch to report on the number of contractor employees providing services.¹⁵⁰ Mandating that service contractors disclose the number of individuals working on their contracts (and in turn requiring agencies to report those numbers) will help the executive branch, Congress and outside observers get a handle on the scope of service contracting.

While the phenomenon of contracting out services is not new,¹⁵¹ policy makers are only just beginning to grapple with this reality of an outsourced workforce. The Chair and Ranking Member of the Senate Homeland Security and Government Affairs Committee recently “expressed shock” that contractor employees outnumber government employees in the Department of Homeland Security.¹⁵²

IV. The Few Ethics Restrictions on Government Contractor Employees

Most of the government ethics statutes and regulations described in Section II of this report do not apply to government contractor employees, even those employees working side by side with and performing the same functions as government employees. As a result, government contractor employees may routinely be giving advice that is tainted by conflicts of interest. The government does not collect information on contractor employees’ conflicts of interest, so it is impossible to know precisely the extent of the problem. But as the following discussion shows, the government has imposed a limited number of ethics restrictions on contractors and the individuals they employ.

A. Distinguishing Organizational from Personal Conflicts of Interest

In considering government contractor ethics, it is important to distinguish between two different types of restrictions: those that address the conflicts of interest of outside organizations that obtain contracts

¹⁵⁰ H.R. 5136, National Defense Authorization Act for FY 2011, § 850.

¹⁵¹ See PAUL LIGHT, *THE TRUE SIZE OF GOVERNMENT* (1999).

¹⁵² Senate Homeland Security and Government Affairs Committee, *Lieberman, Collins Astounded DHS Contract Workers Exceed Number Of Civilian Employees* (Press Release), Feb. 24, 2010.

(known as Organizational Conflicts of Interest or OCIs), and those that address the conflicts of interest of the individuals actually performing the work (known as Personal Conflicts of Interest or PCIs). An OCI arises when a contractor employee has access to government resources or can exercise discretion in a way that could benefit the contractor.¹⁵³ For example, an OCI exists if a contractor employee evaluates on behalf of the government work performed by her employer.

The issue of OCIs often arises in the context of bid protests: where one company contests the government's decision to award a contract to another company, and argues that the award was improper. In the seminal GAO bid protest case based on an OCI, a company that had lost its bid for a contract to provide health services argued that the award was tainted by a conflict of interest because the government hired a consultant to write the criteria for the contract award, and that consultant had a contractual relationship with the winning company. The adjudicating agency agreed with this argument and recognized that the government must guard against organizational conflicts of interest in granting contracts.¹⁵⁴

The government has addressed OCI in its contracting regulations (the Federal Acquisition Regulation or FAR), and defines an OCI as a situation in which a contractor's activities or relationships render it "unable or potentially unable to" provide "impartial assistance or advice," or indicate that its "objectivity in performing the contract work is or might be otherwise impaired."¹⁵⁵ The regulation indicates that contracting officers need to identify such conflicts and avoid or mitigate them,¹⁵⁶ but does not explain how contracting officers should gather the information needed to discern that such conflicts exist.¹⁵⁷ These organizational conflict of interest regulations now form the basis for numerous bid protest decisions, and there is a body of law and an

¹⁵³ Matter of: Aetna Government Health Plans, Inc., B-254397.15 (GAO 1995).

¹⁵⁴ *Id.*

¹⁵⁵ 48 C.F.R. 2.101. The government adopted these regulations in 1984. See Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25, 30-31 (2005). The regulation also includes a third type of organizational conflict: where the contractor's activities or relationships give it "an unfair competitive advantage." This type of OCI is aimed at ensuring a level playing field among contractors rather than protecting the government's fiduciary interest. See Daniel Guttman, *Organizational Conflict of Interest and the Growth of Big Government*, 15 HARV. J. LEGIS. 297 (1978).

¹⁵⁶ 48 C.F.R. 9.504.

¹⁵⁷ REPORT OF THE ACQUISITION ADVISORY PANEL 405 (2007).

infrastructure for implementing these principles through standards and training.¹⁵⁸ But some have criticized these regulations because they place the burden on government officials to identify conflicts without specifying how the official can learn of them.¹⁵⁹ The onus of identifying OCIs is on the contracting officer prior to an award, and the government is not required to monitor OCIs after the award of a contract.¹⁶⁰

A personal conflict of interest or PCI arises when a contractor employee has access to government resources, can exercise discretion in a way that could benefit herself or another person or organization with whom she is associated, or can allocate government benefits among third parties. For the most part, the government does not monitor or regulate contractor employees' PCIs, as the following story illustrates.

In 2006, the Defense Department needed an independent assessment of whether to extend its controversial contract for the F-22 jet fighter, and commissioned the Institute for Defense Analysis (IDA) to conduct that study. IDA is a federally chartered contractor (known as a Federally Funded Research and Development Center or FFRDC). The then-President of IDA, retired admiral Dennis C. Blair, owned hundreds of thousands of dollars of stock in and served on the board of one of the F-22's subcontractors and would benefit financially if the government extended the contract. Blair participated in the review of the F-22 program, and IDA did not disclose Blair's financial interest in it. IDA recommended that the government extend the F-22 program for a three-year contract, and its recommendation was pivotal in the government's decision to do so. The existence of this financial conflict of interest came to light only after a watchdog group found a reference to Blair's

¹⁵⁸ Congress recently mandated that the executive branch examine whether these organizational conflict rules are adequate, § 841(b)(1) of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, and that the Defense Department tighten organizational conflict rules for contractors that are involved in the contracting function. § 207 of the Weapon Systems Acquisition Reform Act of 2009. The Defense Department issued proposed rule for comment on April 22, 2010. DFARS Case 2009-D015.

¹⁵⁹ NATIONAL PROCUREMENT FRAUD TASK FORCE LEGISLATION COMMITTEE, *PROCUREMENT FRAUD: LEGISLATIVE AND REGULATORY REFORM PROPOSALS* 17 (2008).

¹⁶⁰ GOVERNMENT ACCOUNTABILITY OFFICE, *CONTINGENCY CONTRACTING IMPROVEMENTS NEEDED IN MANAGEMENT OF CONTRACTORS SUPPORTING CONTRACT AND GRANT ADMINISTRATION IN IRAQ AND AFGHANISTAN* 20 (2010).

holdings in SEC filings, prompting press scrutiny and a Defense Department Inspector General investigation.¹⁶¹

While a criminal statute prohibits government employees from participating in matters that can have a direct and predictable effect on their own financial interest and a regulation prohibits high-level government employees from receiving compensation for serving on corporate boards of directors,¹⁶² these restrictions do not apply to contractor employees. Thus, Dennis Blair could legally be involved in evaluating a program that could affect his financial interests.

While the government began addressing OCIs in the 1960s and adopted executive-branch wide regulations to limit them decades ago, only a few agencies have adopted regulations addressing contractor employees' PCIs. As the following section will make clear, the government has imposed PCI restrictions on only a few slivers of the vast contracting world.

B. Current Ethics Restrictions on Government Contractors' Employees

The government's approach to regulating the ethics of contractors has been largely reactive rather than proactive. After a government official admitted that the agency in charge of bank bailouts had "no way of knowing whether any conflicts of interest exist among the thousands" of contractors it had hired,¹⁶³ Congress enacted statutory reforms subjecting any FDIC contractor employee who is supervised by an FDIC employee to government ethics statutes and regulations, and required the FDIC to adopt comprehensive ethics regulations for all other

¹⁶¹ PROJECT ON GOVERNMENT OVERSIGHT, PREYING ON THE TAXPAYER: THE F-22A RAPTOR (2006) (available at <http://www.pogo.org/pogo-files/reports/national-security/f-22a-raptor/ns-f-22a-raptor-2006.html#12>); DEPARTMENT OF DEFENSE OFFICE OF INSPECTOR GENERAL, REPORT OF INVESTIGATION: ALLEGED CONFLICT OF INTEREST: ADMIRAL DENNIS C. BLAIR, U.S. NAVY (RETIRED) PRESIDENT, INSTITUTE FOR DEFENSE ANALYSES 15 (2006); R. Jeffrey Smith and Renae Merle, Leader of Panel That Endorsed Jet Program Has Ties to Contractor, WASH. POST, July 25, 2006, D1.

¹⁶² 18 U.S.C. § 208.

¹⁶³ James Risen, *S&L Bailout Agency is Ripe for Fraud, GAO Tells Congress*, L.A. TIMES, Sept. 25, 1990, p.D1 (quoting the director of the Resolution Trust Corporation's asset management division). The Resolution Trust Corporation was a temporary agency whose activities were taken over by the FDIC at the end of 1995.

contractor employees.¹⁶⁴ After Congress investigated the financial conflicts of interest of the president of a Federally Funded Research and Development Center (FFRDC), the Defense Department instituted personal conflict of interest guidelines for FFRDCs.¹⁶⁵ After a series of USA TODAY articles about retired flag officers who worked both as consultants for the Pentagon and for defense contractors, Secretary of Defense Robert Gates instituted a new policy requiring that those consultants be hired only as SGEs so that they will be subject to the confidential financial disclosures and other ethics restrictions applicable to part-time government employees. After the GAO issued several reports identifying ethical problems created by meta-contracting, the government issued proposed regulations addressing personal conflicts of interest in that narrow field.¹⁶⁶ But the potential for conflicts exists on a much broader scale than just meta-contracting. It exists anytime contractor employees exercise discretion on behalf of the government or have access to government resources.

Until 1989, the executive branch's approach to ethics regulation was primarily decentralized and ad hoc.¹⁶⁷ Each agency and department had its own set of ethics regulations. As a result, there was wide variation across agencies in the regulation of gifts, financial conflicts, negotiation for future employment, and other ethics concerns. In 1990, President George H.W. Bush issued an executive order requiring the

¹⁶⁴ 12 U.S.C. § 1822(f), 103 Pub. L. 204, § 19(a) (Act of Dec. 17, 1993); 12 C.F.R. Part 366. Congress also subjected all FDIC contractor employees to the criminal prohibition on bribes and illegal gratuities. 12 U.S.C. § 1822(f)(1)(B).

FDIC's contractor conflict of interest regulations originally applied to all of its service contractors. Contractor Conflicts of Interest, Interim Final Rule, 61 Fed. Reg. 9590 (March 11, 1996). The agency later revised those regulations so that they would not apply to contractors that provide "incidental or housekeeping service[s]," such as food service, janitorial and mail delivery. Minimum Standards of Integrity and Fitness for an FDIC Contractor, Interim Final Rule, 67 Fed. Reg. 34591 (May 15, 2002).

¹⁶⁵ Under Secretary of Defense (Acquisition, Technology & Logistics), Memorandum: Federally Funded Research and Development Center (FFRDC) Avoidance of Conflict of Interest (COI) (Jan. 26, 2007). See GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 21-22 (2008); PROJECT ON GOVERNMENT OVERSIGHT, PREYING ON THE TAXPAYER: THE F-22A RAPTOR (2006) (available at <http://www.pogo.org/pogo-files/reports/national-security/f-22a-raptor/ns-f-22a-raptor-2006.html#12>).

¹⁶⁶ 74 Fed. Reg. 58584 (Nov. 13, 2009).

¹⁶⁷ See PRESIDENT'S COMMISSION ON FEDERAL ETHICS LAW REFORM, TO SERVE WITH HONOR 92 (1989).

Office of Government Ethics (OGE) to develop regulations that would apply across the entire executive branch.¹⁶⁸ Agencies could then seek OGE's permission to issue supplemental departmental ethics rules if they had concerns not sufficiently protected by the executive branch-wide regulations. This endeavor – centralizing and rationalizing ethics regulation – enabled the government to make strides in simplifying and clarifying its ethics regime.

The regulation of government contractors' ethics is now at a stage similar to where the government ethics regulation was decades ago, before OGE undertook to bring rationality and uniformity to government ethics regulation. Congress and a few agencies have addressed contractor employee ethics in a few narrowly defined areas, usually in response to specific scandals.

1. Location of Ethics Standards: Statutes, Regulations, Formal Policies and Ad Hoc Contractual Clauses

The government has taken a variety of approaches in imposing ethics restrictions on contractor employees, from a few statutes that are broad enough to reach not just government employees but also contractors, to regulations specifically aimed at contractor employees, formal policies imposing such restrictions, and the ad hoc use of contract clauses addressing contractors employee ethics. Several agencies have adopted specific substantive standards that contractor employees must follow, and then require contractors to implement those standards. Other agencies, such as the Defense Department, have delegated to contractors not just implementation but also the decision of which specific substantive standards to adopt.¹⁶⁹

While most of the ethics statutes apply only to government employees, a few of them apply to anyone “acting on behalf of the government,” and thus reach contractor employees performing services for the government. The criminal prohibitions on bribery and illegal gratuities have this broader language,¹⁷⁰ and the government has

¹⁶⁸ Ex. Ord. 12731, 55 Fed.Reg. 42547 (Oct. 17, 1990), § 201.

¹⁶⁹ Under Secretary of Defense (Acquisition, Technology & Logistics), Memorandum: Federally Funded Research and Development Center (FFRDC) Avoidance of Conflict of Interest (COI) (Jan. 26, 2007) (requiring FFRDCs to have a conflict of interest plan covering gifts, outside activities and financial conflicts).

¹⁷⁰ 18 U.S.C. § 201(a). In addition, Congress enacted an anti-kickback statute that reaches contractor and subcontractor employees. 41 U.S.C. § 51 *et seq.*

successfully prosecuted contractor employees for accepting bribes in connection with their work for the government.¹⁷¹ The criminal prohibition on disclosure of sensitive procurement information and the prohibition on serving as a foreign agent also have this broader reach.¹⁷² The predecessor to the current criminal financial conflict of interest statute covered anyone who “acts as an . . . agent of the United States,”¹⁷³ but when Congress overhauled ethics statutes in 1962, it narrowed the scope to just officers and employees.¹⁷⁴

While the government has not yet adopted any executive branch-wide ethics restrictions on contractor employees, in 2009 it issued a proposed regulation for contractor employees engaged in meta-contracting.¹⁷⁵ In addition, at least seven executive branch agencies have issued regulations imposing ethics restrictions on the employees of some of their contractors.¹⁷⁶ These regulations are generally narrow in scope, covering only certain types of contractors. For example, personal conflict of interest regulations adopted by the Department of Health and Human Services cover contractors involved with the Medicaid Integrity Audit Program.¹⁷⁷ Even with respect to covered contractors, the regulations generally restrict only certain types of conflicts of interest rather than imposing more comprehensive restrictions. The regulation for the U.S. Agency for International Development (USAID) contractors

¹⁷¹ See GAO, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 11 (2008) (describing 2006 bribery convictions of contractor employees at the Space and Naval Warfare Systems Center and the Coalition Provisional Authority in Iraq for steering contracts). See also *Dixon v. United States*, 465 U.S. 482 (1984) (bribery statute reaches non-governmental organization employee who administered federal grants).

¹⁷² 41 U.S.C. § 423; 18 U.S.C. § 219.

¹⁷³ 18 U.S.C. § 434. The seminal Supreme Court case interpreting this statute, *United States v. Mississippi Valley Generating Co.* (also known as the *Dixon-Yates case*) involved a conflict of interest not of a regular government employee but of an unpaid part-time consultant.

¹⁷⁴ 18 U.S.C. 208(a).

¹⁷⁵ Proposed Rule on Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58584 (Nov. 13, 2009).

¹⁷⁶ Agencies that have adopted regulations imposing ethics restrictions on at least some of their contractors include the Agency for International Development (USAID), the Department of Energy, the Environmental Protection Agency, the Federal Deposit Insurance Corporation, Department of Health and Human Services, the Nuclear Regulatory Commission, and the Treasury Department.

¹⁷⁷ 42 CFR 455.238.

described above, for example, restricts their financial investments and outside employment but not their receipt of gifts.¹⁷⁸

Several agencies without contractor ethics regulations have nonetheless adopted formal policies addressing conflicts of interests among their contractors' employees.¹⁷⁹ For example, after the controversy concerning Dennis Blair's conflict of interest in evaluating the F-22 program, the Defense Department issued a policy requiring its Federally Funded Research and Development Centers (FFRDCs) to screen their employees for conflicts of interest.¹⁸⁰ In 2009, the Undersecretary of Defense for Acquisition, Technology & Logistics issued a memorandum noting that the risk of personal conflicts of interest increases when contractor employees are tasked to make subjective judgments on behalf of the government.¹⁸¹ While the memorandum indicated that the Defense Department "acquisition community must consider the risks of a contractors' employee having PCIs," and discussed six personal conflict of interest scenarios, it did not explain how to identify such conflicts or what to do about them once they are identified.¹⁸²

Some agencies have addressed this issue in a more ad hoc fashion rather than in a more systematic way by including personal conflict of interest clauses in their contracts.¹⁸³ For example, before USAID adopted a regulation on personal conflicts of interest, it included such provisions in some of its contracts, and later adopted a regulation prohibiting contractor employees who are assigned to work in a foreign

¹⁷⁸ 48 CFR 752.7027.

¹⁷⁹ The Defense Department has adopted two policies imposing ethics restrictions on contractors, and a third policy requiring that mentors be hired as employees rather than as contractors. HHS has imposed ethics restrictions on Program Integrity contractors by including such provisions in its Program Integrity Manuals.

¹⁸⁰ Under Secretary of Defense (Acquisition, Technology & Logistics), Memorandum: Federally Funded Research and Development Center (FFRDC) Avoidance of Conflict of Interest (COI) (Jan. 26, 2007).

¹⁸¹ Ashton B. Carter, Under Secretary of Defense for Acquisition, Technology and Logistics, Memorandum re: Personal Conflicts of Interest (PCIs) of Contractors' Employees (Nov. 24, 2009).

¹⁸² *Id.* [sic].

¹⁸³ See GAO, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 15, 48-52 (2008) (Air Force Electronic Systems Center and the Army Communications Electronics Lifecycle Management Command have used clauses requiring contractors to certify that their employees do not have any personal conflicts, or by requiring individual contractor employees to sign agreements not to disclose certain sensitive information they learn through their work).

country from engaging in a business, investing or loaning money to a business in that country.¹⁸⁴ The General Services Administration includes conflict of interest clauses in contracts for auditing and brokerage services but apparently not in contracts for other services.¹⁸⁵ Some Defense Department components include personal conflict of interest clauses in their contracts for meta-contracting services,¹⁸⁶ but few offices use such clauses for other services.¹⁸⁷

2. Substantive Ethics Restrictions on Contractors' Employees

At least seven agencies have adopted regulations addressing personal conflicts of interest among the employees of some of their contractors.¹⁸⁸ Among these various regulations, one can find restrictions in four of the five substantive categories of ethics regulation: financial influences, misuse of government resources, outside activities

¹⁸⁴ USAID included a personal conflict of interest provision in a contract with Harvard University to advise the Russian government on developing securities regulations. When Harvard employees disregarded those restrictions and invested in Russia equities, that contractual provision formed the basis for a False Claims Act lawsuit against Harvard and those employees. *United States v. Harvard*, 323 F.Supp.2d 151 (D. Mass. 2004). USAID's regulation provides an exception for contractor employees and consultants who are citizens or legal residents of that foreign country. 48 C.F.R. 752.7027(e). This sort of exception is logical since those individuals would already be expected to have an allegiance to that country through their status as citizen or legal resident.

¹⁸⁵ Letter from GSA Inspector General Brian Miller to Kathleen Clark, July 20, 2010 (on file with author).

¹⁸⁶ GAO, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 9 (2008) ("all DoD offices we reviewed that used contractor employees in the source selection process use additional safeguard controls such as contract clauses designed to prevent personal conflicts of interests"). One Air Force office had started using such a clause by the late 1990s. *Id.* at 15.

¹⁸⁷ GAO, DEFENSE CONTRACTING: ARMY CASE STUDY DELINEATES CONCERNS WITH USE OF CONTRACTORS AS CONTRACT SPECIALISTS 13 (2008) (only 6 of the 21 program officers had personal conflict of interest safeguards for contractor employees who provide advice and assistance on governmental decisions).

¹⁸⁸ The seven agencies with regulations addressing contractor employees' personal conflicts of interest are the Agency for International Development, 48 CFR 752.7027, Department of Energy, 48 CFR 970.0371, Department of Health and Human Services, 42 CFR 455.238, Department of Treasury, 31 CFR 31.214, Environmental Protection Agency, 48 CFR 1552.209-73, Federal Deposit Insurance Corporation, 12 CFR Part 366, and Nuclear Regulatory Commission, 48 CFR 2052.209.

and employment after the end of the contract. (See Table V listing selected agency regulations.)

Most of the agencies with such regulations have adopted very narrow regulations. The regulations apply only to a narrow range of the agency's contractors, and then impose only a few restrictions on them.¹⁸⁹ Regulations adopted by the Department of Treasury, for example, apply only to its TARP contractors.¹⁹⁰

While the federal government's regulation of contractor employee ethics is generally spotty, one agency has taken a different approach, imposing a comprehensive set of ethics restrictions on all of its service contractors. The FDIC regulates the ethics of all its service contractors' employees, and has adopted regulations addressing their financial conflicts, gifts, outside employment and activities, their use of government resources (including information), and activities after the end of the contract.¹⁹¹

This section provides a brief overview of some of the existing ethics restrictions on government contractor employees. It will first address in some detail how different agencies have regulated financial influences on contractor employees, and will then discuss more briefly agencies' restrictions on the misuse of government resources, outside activities and employment after the end of a contract.

As a starting point, it is important to remember that most contractor employees are not bound by *any* financial conflict of interest restriction.¹⁹² But a handful of agencies have adopted restrictions to prevent financial conflicts of interest among their contractors' employees. Agencies have taken a range of approaches. One agency, USAID, prohibits certain contractor employees from making one specific class of investments -- investing in businesses in the foreign country

¹⁸⁹ The one exception is the Federal Deposit Insurance Corporation (FDIC), which has apparently imposed ethics restrictions on the employees of all of its contractors. 48 CFR Part 366.

¹⁹⁰ 31 CFR 31.200. The contractor ethics restrictions adopted by the Department of Energy apply only to its Management and Operations contractors. Those adopted by the EPA apply only to its major Superfund contractors and outside bid evaluators. See Table V.

¹⁹¹ See Table V.

¹⁹² Thus, as a contractor employee, Dennis Blair was able to participate in the evaluation of the F-22 fighter jet even though he owned substantial stock in an F-22 subcontractor that would be affected by any decision whether to continue the program.

where they are performing USAID work.¹⁹³ But most agencies take a more general approach, prohibiting:

- financial interests “that could adversely affect . . . [the individual’s] objectivity or judgment,”¹⁹⁴
- “conflict[s] of interest . . . that “may diminish [the individual’s] capacity to perform . . . impartial[ly or] . . . objective[ly],”¹⁹⁵
- a “financial interest . . . that relates to the services . . . perform[ed] under the contract,”¹⁹⁶
- a “personal concern” that “may be incompatible with the government’s interest,”¹⁹⁷ and
- “a relationship . . . with an entity that may impair the objectivity of the employee . . . in performing the contract work.”¹⁹⁸

These agency regulations do not explain precisely which interest, concerns and relationships they prohibit. They stand in sharp contrast to the financial conflict standard applicable to government employees, which prohibits them from participated personally and substantially in matters in which they have a financial interest.¹⁹⁹

While the financial conflict of interest standards for government employees reach not just their *own* interests but also those of their family members, organizations with which they are associated, and anyone with whom they are negotiating for future employment,²⁰⁰ most contractor ethics regulations reach only the contractor employees’ interests. One exception is the Treasury Department’s new regulations for TARP contractors, which also addresses the interests of the contractor employee’s “spouse, minor child, or other family member with whom the individual has a close personal relationship.”²⁰¹

¹⁹³ 48 CFR 752.7027. USAID’s approach is similar to certain financial conflict of interest provisions that restrict all of an agency’s employees from owning certain types of investment, regardless of whether the particular employee has the authority to exercise discretion in a way that could benefit that investment. *See supra* note 37.

¹⁹⁴ 31 CFR 31.201 (Treasury Department regulation addressing TARP contractor employees’ personal conflicts of interest).

¹⁹⁵ 48 CFR 1503.104-5 (applicable to non-government employees who evaluate bids).

¹⁹⁶ 12 CFR 366.10(a)(1).

¹⁹⁷ 48 CFR 970.0371-6.

¹⁹⁸ 48 CFR 1552.209-73(b) (EPA Superfund contracts in excess of simplified acquisition threshold).

¹⁹⁹ 18 U.S.C. § 208(a); 5 CFR 2635.401 *et seq.*

²⁰⁰ 18 U.S.C. § 208.

²⁰¹ 31 CFR 31.212 (defining a personal conflict of interest to include ““a personal, business, or financial interest of an individual, his or her *spouse, minor child, or other*

On the issue of gifts, agencies again take a variety of approaches. The regulations for the Medicaid Integrity Audit Program address contractor employees from soliciting or accepting gifts from any entity “reviewed, audited, investigated, or contacted” under the contract, regardless of the employee’s particular duties.²⁰² Treasury and FDIC regulations prohibit gifts from anyone who could be affected by the employee’s performance of his duties.²⁰³ The Energy Department takes a narrower approach, prohibiting gifts from individuals or organizations with whom the contractor is doing business “under circumstances which might reasonably be interpreted as an attempt to influence the recipient[] in the conduct of [his] duties.”²⁰⁴

Six agencies have regulations restricting the outside employment of contractors’ employees. Some of these regulations are very general in approach, prohibiting any “business . . . or financial . . . relationship that relates to services . . . perform[ed] under the contract,”²⁰⁵ most identify specific types of employment that are prohibited because of their nexus to the subject of the contract. For example, Treasury prohibits TARP contractors who are involved with the management or disposition of assets from purchasing those assets,²⁰⁶ and prohibits those involved with the purchase of assets from selling them.²⁰⁷

While five agencies have regulations imposing confidentiality obligations on contractor employees, these obligations vary in scope. The EPA’s regulation covers “information relating to the proposal” that the contractor employee is evaluating.²⁰⁸ Other regulations cover any

family member with whom the individual has a close personal relationship, that could adversely affect the individual's ability to perform under the arrangement, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury” (emphasis added).

In addition, the Medicaid Integrity regulations indicate that it would be a conflict of interest for a contractor employee to accept a job offer from an entity that is being reviewed. 42 CFR 455.238. That regulation does not directly prohibit contractor employees from accepting such job offers. Instead, it states that an employee acceptance of a job offer would constitute a post-award conflict of interest, and in response the government can terminate, modify, or choose not to renew the contract.

²⁰² 42 CFR 455.238(b)(1).

²⁰³ 31 CFR 31.213(a)(1); 12 CFR 366.12(d)(1).

²⁰⁴ 48 CFR 970.0371-4.

²⁰⁵ 12 CFR 366.10(a)(1) (FDIC).

²⁰⁶ 31 CFR 31.214(a).

²⁰⁷ 31 CFR 31.214(b).

²⁰⁸ 48 CFR 1503.104-5 (EPA).

information protected from disclosure under the Privacy Act and FOIA, “nonpublic information,” or “privileged information.” The FDIC’s regulation reaches any information obtained in connection with the contract, but exempts information that is “generally available to the general public.” Of the agencies surveyed, only the FDIC and Treasury have regulations restricting the use of government property,²⁰⁹ and only the FDIC explicitly prohibits contractor employees from providing preferential treatment.²¹⁰

Only two agencies have regulations addressing the outside activities of contractor employees. The FDIC prohibits its contractor employees from engaging in any activity that would impair their independence, from having relationships that relate the services they are performing, and from participating as a party or representing a party in litigation against it.²¹¹ Treasury prohibits management officials and “key personnel” of its TARP contractors from engaging in other transactions with Treasury regarding TARP assets.

3. Mechanisms for Implementing Current Ethics Restrictions on Contractors’ Employees

Government agencies have adopted, to a limited degree, some of the same mechanisms to implement ethics restrictions on contractor employees that exist for government employees: training, advice, mandated disclosure and review of those disclosures, investigation of alleged violations and sanctions for violations. In addition, some agencies have required contractor employees with access to confidential information to sign nondisclosure agreements. But just as in the case with substantive restrictions, their use of these mechanisms in the contractor employee context is spotty and inconsistent.

The Environmental Protection Agency (EPA) requires individuals who evaluate bids to certify that they do not have any conflicts of interest that could diminish their capacity to act impartially

²⁰⁹ 12 CFR 366.12(d)(2); 31 CFR 31.213(a)(2).

²¹⁰ 12 CFR 366.12(a). Similarly, employees for Medicaid Integrity Audit Program contractors may not work for “any entity that is reviewed, audited, investigated, or contacted” under the contract, 42 CFR 455.238(b)(1), and employees for certain NRC contractors may not work for a “NRC licensee or applicant undergoing an NRC audit, inspection, or review.” 48 CFR 2052.209-72(c)(2).

²¹¹ 12 CFR 366.10(a).

and that they will not disclose or misuse the information they learn.²¹² This approach – requiring certification of no financial conflicts rather than comprehensive disclosure of financial interests – is less intrusive of contractor employees’ privacy. But its efficacy in preventing conflicts depends on contractor employees’ ability to understand what would constitute a conflict and to apply that knowledge to their own investment portfolio.

In November 2009, the executive branch proposed new regulations to address personal conflicts of interest of contractor personnel who are involved in meta-contracting.²¹³ These draft regulations would require contractors to screen their employees for conflicts of interest by requiring that employees annually disclose their financial interest to the contractor.²¹⁴ Contractors would be required to inform their employees of the personal conflict of interest standards, verify their employees’ compliance with those standards, discipline employees who violate them and report any violations to the contracting officer.²¹⁵ The government would become involved only if the contracting officer suspects a violation, or if the contractor notifies the contracting officer of a violation and requests a waiver from the head of the contracting agency.²¹⁶

4. Sanctions for violations of Government Contractor Ethics Restrictions

Violation of the contractor ethics standards can result in a range of sanctions. The government can modify the contract, refuse to renew it, or terminate the contract. A conflict of interest may result in a contractor’s disqualification. Inaccurate statements on certifications or

²¹² 48 CFR 1503.104-5.

²¹³ Proposed Rule on Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed. Reg. 58584 (Nov. 13, 2009).

²¹⁴ The draft regulation requires Contractor employees to update their financial disclosures at least annually, and whenever a new personal conflict arises. § 3.1101. It defines personal conflict as any “financial interest, personal activity, or relationship that could impair the employee’s ability to act impartially and in the best interest of the Government when performing under the contract,” including compensation, investments, gifts, travel expense reimbursement, intellectual property interest of the “employee, close family members, or other members of the household.” § 3.1101.

²¹⁵ 74 Fed. Reg. 58584 (Nov. 13, 2009) (proposed regulations).

²¹⁶ §§ 3.1105, 3.1103, 3.1104.

disclosures may result in debarment, False Claims Act lawsuits,²¹⁷ and criminal prosecution.

V. Developing Ethics Standards for Contractor Employees: The Need for a More Systematic Approach

As Section III described, the government has outsourced huge swaths of its work to the private sector. It has chosen to do so because of certain perceived benefits: the ability to obtain expertise without going through the unwieldy process of hiring government employees;²¹⁸ the flexibility to obtain services quickly in response to a crisis²¹⁹ or on a short-term basis;²²⁰ the possibility of saving money and gaining efficiency by using the private sector;²²¹ and the political benefit of being

²¹⁷ The government has brought False Claims Act cases on the theory that a contractor's failure to disclose a conflict of interest constitutes an implied false certification. *See e.g.*, *United States v. Harvard*, 323 F.Supp.2d 151 (D. Mass. 2004); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999) (false certification to Department of Energy that contractor had no conflicts of interest); *United States v. Science Applications International Corp.*, 555 F.Supp.2d 40 (D.D.C. 2008) (false certification to Nuclear Regulatory Commission that contractor had no conflicts).

A key issue that arises in these cases is the appropriate measure of damages. Defendants argue that the government incurred no harm because the defendants provided the services requested. The government argues that the entire cost of the contract should be refunded because the government contracted for unbiased services. In a case involving an implied false certification that the contractor had no organizational conflicts of interest, the district court accepted the government's measure of damages. *United States v. Science Applications International Corp.*, 653 F.Supp.2d 87 (D.D.C. 2009).

²¹⁸ National Commission on the Public Service, *Urgent Business for America: Revitalizing the Federal Government for the 21st Century* 27, 29 (2003). PARTNERSHIP FOR PUBLIC SERVICE, *CLOSING THE GAP: SEVEN OBSTACLES TO A FIRST-CLASS FEDERAL WORKFORCE* 4 (2010).

²¹⁹ *See* Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, 6 J. CONTRACT MGMT. 9 (Summer 2008) (discussing the government's extensive use of contractors after initiating two wars in a two-year period); MARK K. CASSELL, *HOW GOVERNMENTS PRIVATIZE: THE POLITICS OF DIVESTMENT IN THE UNITED STATES AND GERMANY* (2003) (describing the Resolution Trust Corporation's extensive use of contractors in the early 1990s to respond to the savings and loan crisis).

²²⁰ Steven J. Kelman, *Achieving Contracting Goals and Recognizing Public Law Concerns: A Contracting Management Perspective*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 153 (Jody Freeman and Martha Minow, eds. 2009).

²²¹ *But see* Bernard D. Rostker, Robert S. Leonard, Obaid Younossi, Mark V. Arena, and Jessie Riposo, *Cost Controls: How Government Can Get More Bang for Its Buck*, RAND

able to claim a smaller government without the political cost of actually decreasing government services.²²²

Some critics of contracting have expressed concern that individual members of the public are not adequately protected against abuses by contractor employees who do not take an oath of office and are not subject to the Constitution, the Freedom of Information Act or other laws that can hold government employees accountable.²²³ This report focuses on a different issue: whether the government has adequately protected *itself* from contractor employees.²²⁴

A. Proposed Substantive Standards for Contractor Employee Ethics

While we do not know how often contractor employees have acted in ways that would be prohibited if they had been government employees, the examples of Dan Jester and Dennis Blair suggest that the government is vulnerable to such abuse. As the government delegates more services to contractor employees, it becomes vulnerable to abuses by those employees.²²⁵

Some commentators have suggested that contractor employees should not be subject to the same ethics restrictions that apply to government employees because many contractors already impose ethics

REVIEW (April 2009) (reporting on several studies indicating that contractor employees cost more than government employees).

²²² PAUL LIGHT, *THE TRUE SIZE OF GOVERNMENT* (1999).

²²³ See Gillian E. Metzger, *Privatization As Delegation*, 103 COLUM. L. REV. 1367 (2003); Laura A. Dickinson, *Public Law Values in a Privatized World*, YALE J. INTL. L. 383 (2006); Daniel Guttman, *Public Purpose and Private Service, The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, OECD J. BUDGETING 861 (2003); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83 (2003); David H. Rosenbloom* and Mei Jen Hung, *Administrative Law and Culture for the U.S. Collaborative Governance State*, 2009 J. DISP. RES. 327.

²²⁴ While the government has not adequately protected its own interests, it has used its procurement policy to promote the interests of many other constituencies, including laborers 48 CFR 22.403-1 *et seq.*, the blind, 48 CFR 8.700 *et seq.*, small businesses, 48 CFR 19.000 *et seq.*, historically black colleges, 48 CFR 26.300 *et seq.*, and potential victims of human trafficking. 48 CFR 22.1700 *et seq.*

²²⁵ The Obama administration may have reversed this trend by encouraging agencies to in-source services.

restrictions on their employees.²²⁶ The government already requires its largest contractors to have their own internal ethics codes,²²⁷ but it does not require that those codes prohibit employees with personal conflicts of interest from working on government contracts.²²⁸ Most corporate ethics codes are aimed at preventing their employees from acting in a way that is disloyal to the corporation, not disloyal to the corporation's client, the government.²²⁹ A GAO report found only a few examples of contractors with conflict of interest policies that protect the government.²³⁰ Some of these codes address the financial conflicts of individual employees, but unlike the government ethics regulations, they do not attribute to the employee the financial interests of their spouses or other family members.²³¹ At least one contractor has required all professional employees annually to submit a financial disclosure form modeled on a federal form, requiring disclosure of the employee's or a household's financial interest in contractors that are involved in the defense programs on which the employee works.²³²

Are additional ethics standards needed for contractor employees? GAO asked Defense Department program officers whether the government should impose additional ethics standards for contractor employees. While all recognized the need for ethics standards in meta-contracting, few had implemented such standards for other services and some opposed imposing new restrictions. They noted that government

²²⁶ Letter from Alan Chvotkin to Meredith Murphy commenting on FAR Case 2007-017 "Service Contractor Employee Personal Conflicts of Interest" at 2 (July 17, 2008).

²²⁷ FAR Subpart 3.10.

²²⁸ Cf. 42 CFR 414.912 (requiring Medicare Drug Contractors to have a code of conduct addressing "conflicts of interest between the [contractor] and any entity, including the Federal Government, with whom it does business").

²²⁹ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 18 (2008).

²³⁰ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 9 (2008) ("only three [out of 18 contractors with conflict of interest policies] directly require their employees to identify potential personal conflicts of interest with respect to their work for DOD so they can be screened and mitigated by the firms").

²³¹ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 19 (2008).

²³² GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 20 (2008).

officials -- rather than contractor employees -- are ultimately responsible for making decisions; and that additional restrictions will impose additional costs, and could deter some from contracting work.²³³ Even if a government official is ultimately responsible for a final decision, there can be no doubt that contractor employees now advise the government about those decisions, and the ethics rules for government employees appropriately reach both those who make decisions and those who give advice. The other concerns, cost and deterring others from bidding on contracts, are legitimate, and in identifying mechanisms to implement ethics standards, the government should consider how to reduce the cost to contractors and the inconvenience to contractor employees.²³⁴

It is quite a challenge to develop the right approach to applying ethics principles to government contractor employees. At the extremes, one could either exempt all government contractor employees from all ethics restrictions or impose the full panoply of ethics restrictions on all government contractor employees.²³⁵ Of course, neither of these approaches is satisfactory. The government has for the most part taken the former approach,²³⁶ leaving it vulnerable to abuse by contractor employees. The other extreme -- reflexively imposing every government ethics restriction on all contractor employees -- may provide only limited benefit for the government while imposing substantial costs, such as imposing ethics restrictions on contractor employees (such as those mowing lawns) who are not in a fiduciary position.

This report recommends an alternative approach. As a preliminary matter, one must first determine which ethical principles are appropriately applied to contractors. Ethics restrictions on government employees reflect four distinct principles: (1) the fiduciary nature of public office; (2) public confidence in government; (3) Congressional and executive branch control of workers; and (4) ensuring that officials

²³³ GOVERNMENT ACCOUNTABILITY OFFICE, DEFENSE CONTRACTING: ADDITIONAL PERSONAL CONFLICT OF INTEREST SAFEGUARDS NEEDED FOR CERTAIN DoD CONTRACTOR EMPLOYEES 25 (2008).

²³⁴ Cf. National Commission (2003) (discussing need to simplify financial disclosure requirements for government employees).

²³⁵ Cf. Letter from A.R. Hodgkins to Diedra Wingate commenting on FAR Case 2007-017 at 5 (May 27, 2008) (“the full panoply of laws and regulations applicable to Government employees are inappropriate for application to even that subset of [contractor] employees whose roles may raise PCI concerns”).

²³⁶ There are a few exceptions where the government has imposed ethics restrictions on contractor employees. See Section IV, *supra*.

devote adequate attention to their responsibilities. Of these four, the first and third principles appear to be the most compelling and should also be applied to the employees of government contractors.

To the degree that contractor employees exercise discretion on behalf of the government, have access to government resources, or allocate government benefits among the public, they – like their government employee counterparts – owe fiduciary duties. They are in a position to use that discretion or resource for their own or another private purpose, or may allocate government benefits unfairly. It is appropriate to put in place restrictions that help ensure that contractor employees know about and do not violate their fiduciary duties.²³⁷

The third principle – Congressional and executive branch control of workers – has particular resonance with regard to contractor employees. While the federal government has engaged in large-scale outsourcing of services, it has not closely monitored this outsourcing, and does not yet have an accurate, comprehensive inventory of the services contractors provide and the number of contractor employees providing them. While it is appropriate for the government to delegate to contractors the day-to-day monitoring of particular contractor employees, the government should be able to exercise control over contractor-provided services on a more global level. To do that, it must first get a handle on the number of contractor employees who are performing those services. While Congress has passed legislation requiring an inventory of contractor-provided services, the government also needs to develop an accurate census of the contractor employees. Only with this information can the government exercise an appropriate level of control over the contractor employees who are working indirectly on its behalf.

There is a less compelling case for expressing the remaining two principles in the regulation for contractor employees. While the second principle -- public confidence in government -- is a legitimate concern, it can largely be addressed by imposing fiduciary-based restrictions that actually protect the public trust rather than simply respond to public perception. The government can address the fourth principle – ensuring that workers devote adequate attention to their work -- in the structure of contracts themselves rather than imposing an extra layer of regulation on

²³⁷ The fact that a contractor employee may also owe duties to her direct employer – the contractor – does not diminish the fiduciary duties she owes to her employer’s client, the government. This situation of a contractor employee is analogous to that of a law firm associate. Both owe fiduciary duties to the employer’s client.

contractor employees. By using fixed-price rather than time-and-materials contracts, the government can effectively delegate to the contractor the responsibility and incentive to ensure that contractor employees perform diligently.

This report argues that the government should gather sufficient information about service contractor employees so that it can exercise control over their work, and that it should impose on those employees ethics restrictions that reflect their fiduciary position. The next step is to determine which types of fiduciary-based restrictions are most appropriate in this context.

A few of the fiduciary-based restrictions already apply to contractor employees. The criminal prohibitions on bribery, illegal gratuities, revealing sensitive procurement information and acting as an agent for a foreign government apply not just to government employees, but also to any “person acting for or on behalf of the United States.”²³⁸ A similar approach was taken in the predecessor to the current financial conflict of interest statute. The earlier statute applied not just to employees, but also to agents,²³⁹ and the leading Supreme Court decision construing that statute dealt with a government consultant who worked on an unpaid, part-time, temporary basis.²⁴⁰ A contracting fraud task

²³⁸ 18 U.S.C. § 201(a); 18 U.S.C. § 219(c); 41 U.S.C. § 423(a)(2)(A). *See also* 5 U.S.C. § 7342(a)(1)(B) (restriction on gifts from foreign governments and international organizations applies not just to employees, but also to some outside experts and consultants).

²³⁹ The predecessor statute, 18 U.S.C. § 434, repealed by Act of Oct. 23, 1962, Pub. L. 87-849 § 2, 76 Stat. 1126:

Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, *is employed or acts as an officer or agent of the United States* for the transaction of business with such business entity, shall be fined not more than \$2,000 or imprisoned not more than two years, or both.

(emphasis added). While the predecessor statute broader than its replacement in that it reached not just employees but also agents, it was narrower than its replacement in that it applied only to “transaction[s] of business with . . . business entit[ies],” whereas the replacement applied to any “proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest or other particular matter.” 18 U.S.C. § 208(a), Pub. L. 87-840, 76 Stat. 1124.

²⁴⁰ *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) (government contract for purchase of power plant was unenforceable where government consultant

force recently recommended that the criminal financial conflict of interest statute be amended to cover contractor employees who are involved in meta-contracting.²⁴¹ But the problem of contractor conflicts of interest is not limited to the meta-contracting context, and the government should take a more comprehensive approach.

The government should follow two components of the FDIC's approach to contractor ethics. First, FDIC contractor employees who are supervised by FDIC employees are deemed to be government employees for the purpose of government ethics restrictions.²⁴² The executive branch can – and should -- unilaterally impose the full panoply government ethics *regulations* on such contractor employees.²⁴³ It does not need statutory authority to do so.²⁴⁴ On the other hand, applying government ethics *statutes* (including the criminal prohibition on financial conflicts) on such contractor employees will require legislation.²⁴⁵ Adopting this realistic (rather than formalistic) approach

that advised the government on contract negotiations was employee of bank that would benefit from construction of plant).

²⁴¹ NATIONAL PROCUREMENT FRAUD TASK FORCE LEGISLATION COMMITTEE, PROCUREMENT FRAUD: LEGISLATIVE AND REGULATORY REFORM PROPOSALS 16-17 (2008) (recommending an expansion of the statute on financial conflicts, but not the other criminal conflict of interest statutes).

²⁴² 12 U.S.C. § 1822(f)(1)(B).

²⁴³ The regulatory language could closely follow the model of the FDIC statute. 12 U.S.C. § 1822(f)(1). Here is proposed regulatory language:

“Any individual who, pursuant to a contract or any other arrangement, performs functions or activities of the executive branch, under the direct supervision of an officer or employee of the executive branch, shall be deemed to be an employee of the executive branch for purposes of the ethics and conflict of interest rules and regulations issued by the Office of Government Ethics, including those concerning employee conduct, financial disclosure, and post-employment activities.”

²⁴⁴ While the FDIC adopted its comprehensive ethics regulations for contractors in response to a statutory mandate, 12 U.S.C. § 1822(f)(3), the executive branch could impose ethics regulations on service contractor employees without any additional statutory authority. Most of the agency regulations on contractor ethics were not adopted in response to specific statutory mandates.

²⁴⁵ Proposed statutory language would be:

“Any individual who, pursuant to a contract or any other arrangement, performs functions or activities of the executive branch, under the direct supervision of an officer or employee of the executive branch, shall be deemed to be an employee of the executive branch for purposes of title 18, United States Code.”

toward individuals who are formally independent contractors (or contractor employees) but act like government employees can prevent future “Dan Jester” problems: where agencies avoid application of government ethics standards by “hiring” individuals as independent contractors.

Second, the executive branch should adopt comprehensive ethics restrictions for all of its service contractors. The FDIC took this approach more than a decade ago, adopting regulations on contractor employees’ financial influences, their use of government resources, outside activities, and post-employment activity. The FDIC’s experience in administering this ethics regime demonstrates that a comprehensive approach to contractor employees’ ethics is possible.

The FDIC’s regulations provide a useful starting point, but in some cases, specific regulations adopted by other agencies appear to better address fiduciary concerns. As an initial matter, it is important to recognize that some services, such as lawn mowing, do not place contractor employees in a fiduciary position, and fiduciary-based restrictions should not be imposed on those contractor employees. Therefore, agencies should have the ability to exempt from coverage those service contracts that do not place contractor employees in a fiduciary position. The Treasury Department takes this approach, authorizing the TARP Chief Compliance Officer to exempt contracts for “administrative services” from its conflict of interest regulations.²⁴⁶

Another aspect of the TARP regulations worth emulating is its provision on contractor employees’ financial conflicts of interest. It reaches not just the interests of a contractor employee himself, but also his “spouse, minor child, or other family member with whom the individual has a close personal relationship.”²⁴⁷ On the regulation of

²⁴⁶ See 31 CFR 31.200(b).

²⁴⁷ 31 CFR 31.212 (defining a personal conflict of interest to include ““a personal, business, or financial interest of an individual, his or her spouse, minor child, or other family member with whom the individual has a close personal relationship, that could adversely affect the individual's ability to perform under the arrangement, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury” (emphasis added)).

In addition, the Medicaid Integrity regulations indicate that it would be a conflict of interest for a contractor employee to accept a job offer from an entity that is being reviewed. 42 CFR 455.238. That regulation does not directly prohibit contractor employees from accepting such job offers. Instead, it states that an employee acceptance of a job offer would constitute a post-award conflict of interest, and in response the government can terminate, modify, or choose not to renew the contract.

outside activities, while the FDIC has both specific, narrowly tailored restrictions (such as litigating against the FDIC²⁴⁸) and broader, somewhat vague prohibitions (such as engaging in an activity that would impair independence²⁴⁹). Rather than imposing a broad and vague prohibition on all service contractor employees, the government should define with greater precision what types of outside activities would impair an individual's independence.

Only two agencies have adopted regulations restricting contractor employees' activities after the end of the contract, and both are narrow in scope. The FDIC prohibits contractor employees who have performed services on specific assets from purchasing assets for three years,²⁵⁰ and the NRC prohibits contractor employees who have performed work at the site of an NRC licensee or applicant from seeking work from or working for that licensee or applicant for one year.²⁵¹ The FDIC's regulation appears to be aimed at preventing the abuse of confidential information about FDIC assets. The NRC's regulation appears to be aimed at preventing contractor employees' current work for the agency from being influenced by the prospect of future employment by an entity regulated by the agency. The narrow reach of these regulations suggests that appropriate reach of post-employment restrictions is quite context-dependent. Rather than adopting a post-employment rule that would apply across the entire executive branch, individual agencies need to identify those types of situations where concerns about the protection of confidential information or potential bias (based on the prospect of future employment) should be addressed through post-employment restrictions.

The following section discusses the government's options for implementing these fiduciary-based standards.

B. Proposed Mechanisms for Implementing Contractor Employee Ethics

In addition to the challenges of creating the appropriate ethics standards for contractor employees, it will be necessary to create mechanisms for implementing them. The protection provided by

²⁴⁸ 12 CFR 366.10(a)(2).

²⁴⁹ 12 C.F.R. 366.10.

²⁵⁰ 12 CFR 366.10(a)(3).

²⁵¹ 48 CFR 2052.209-72.

substantive ethics standards will be illusory unless those standards are accompanied by implementation mechanisms.²⁵² The substantive ethics standards for government employees are implemented through training, advice, mandated financial disclosures, review of those disclosures, investigation of alleged violations, employment discipline and prosecutions. The government must decide whether to implement its ethics standards for contractor employees through criminal, regulatory or contractual prohibitions, and whether to provide for enforcement through criminal prosecution, civil fines, False Claims Act litigation, debarment or other contractual remedies.

A key issue in implementing the substantive ethics standards outlined above is whether responsibility for implementation and enforcement will be centralized within a single office in the federal government;²⁵³ relegated to individual contracting officers who already have responsibility for identifying and addressing organizational conflicts of interest; distributed among contractor-ethics point persons in the various federal agencies;²⁵⁴ or delegated to the government's many contractors themselves.

The responsibility to recognize and resolve organizational conflicts of interest has been on contracting officers, and some observers have complained that these officials do not have the information, expertise, inclination or resources to detect and respond adequately to these conflicts.²⁵⁵ Contracting officers' primary concern is the efficient administration of the procurement system, not careful adherence to ethical standards. Once again, the FDIC appears to provide the best practice for dealing with personal conflicts of interest. While FDIC contracting officers are charged with reviewing contractors' assertions

²⁵² See LIBRARY OF CONGRESS, A COUNTRY STUDY: SOVIET UNION (FORMER) (available at [http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field\(DOCID+su0219\)\)](http://lcweb2.loc.gov/cgi-bin/query/r?frd/cstdy:@field(DOCID+su0219)))) (the Soviet constitution purported to guarantee certain political rights, but did not include mechanisms for the protection of those rights).

²⁵³ The government has a central office for developing contracting policies: the Office of Federal Procurement Policy, located within the Office of Management and Budget.

²⁵⁴ Each federal agency has a Designated Agency Ethics Official who administers the financial disclosure requirements and provides ethics advice and training. The government may want to consider creating within each agency the position of "Designated Agency Contracting Official," and placing on that official the responsibility for monitoring contractors' compliance with ethics norms.

²⁵⁵ In 2010, the Defense Department proposed regulations that would require contractors that has identified an organizational conflict of interest after a contract award to disclose the conflict to the Contracting Officer. 75 Fed. Reg. 20954 (April 22, 2010).

regarding conflicts,²⁵⁶ they must forward all conflict issues to the contracting unit of the agency's general counsel's office, which then undertakes a review of the conflict.²⁵⁷ This separation of responsibility helps ensure that someone trained in ethics concerns will address conflicts that arise.

The issue of how to implement financial conflict of interest standards on contractor employees is quite complicated. While the government requires hundreds of thousands of its own employees to file financial disclosure forms that are then reviewed by ethics officials, this may not be the optimal approach.²⁵⁸ The FDIC does not require contractor employees to fill out annual financial disclosure forms, but does require them to certify to the contractor whether they have any financial or other conflicts that would violate the FDIC's standards,²⁵⁹ and then requires contractors to certify whether their employees have any such conflicts.²⁶⁰

This certification model is similar to the federal government's approach in monitoring the conflicts of interest of employees of recipients of research grants. Institutions receiving those grants have the responsibility – and freedom -- to develop and administer conflict of interest disclosure programs for their own employees.²⁶¹ The Treasury Department's TARP regulations mandate financial disclosures from contractor employees, and a proposed regulation currently under consideration would impose such an obligation contractor employees involved in meta-contracting.²⁶² The government should not expand financial disclosure requirements until it evaluates the relative merits of other approaches that are less burdensome and more narrowly tailored to addressing legitimate ethical concerns.

If a contractor's certification that its employees have no personal conflicts is false, it may form the basis for a civil lawsuit or

²⁵⁶ FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(a) (2008).

²⁵⁷ FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.306(b) (2008).

²⁵⁸ These paper-based forms take extensive amounts of time for individual employees to fill out, and require the disclosure of information that may have no clear relation to application of financial conflicts standards.

²⁵⁹ 12 C.F.R. § 366.14(a).

²⁶⁰ 12 CFR 366.14(c).

²⁶¹ See 42 C.F.R. 50.601 *et seq.*

²⁶² FAR Case 2008-025, Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions, 74 Fed.Reg. 58584 (November 13, 2009) (proposing 48 CFR 3.1103(a)(1)).

criminal prosecution under the False Claims Act. The government has used this approach with respect to both personal and organizational conflicts of interest, and has filed False Claims Act suits where contractors made false certifications.²⁶³

One such case stemmed from a USAID contract with Harvard University to assist the Russian government in the development of its capital markets. While there was no statutory or regulatory mandate to do so, USAID incorporated into its contract a provision requiring Harvard to prohibit the employees who worked on this project from investing in equities in Russia. After the government learned that the leaders of the Harvard program had invested in Russian companies, USAID rescinded the contract and filed a civil False Claims Act lawsuit against those employees and Harvard. The suit survived a motion to dismiss, and eventually the parties settled the case for \$31 million.²⁶⁴

The tale of Harvard and USAID might suggest to some that we can rely on False Claims Act lawsuits to ensure the integrity of government contractors. But not all agencies include this kind of conflict of interest provision in their contracts, and even those that do must resort to lengthy and expensive litigation to enforce these norms. The better approach would be to clarify the ethics standards with which contractor employees must comply, provide them with clear training on those standards, and ensure adequate disclosure so that contractors can be held accountable in an efficient manner when they violate those standards. The FDIC requires contractors to agree to employ only individuals who comply with the ethics standards for contractors,²⁶⁵ and to train their employees about those standards.²⁶⁶ The government should impose these obligations on all service contractors across the entire executive branch.

VI. The Need for Additional Empirical Research

²⁶³ See, e.g., cases cited in note 173; *but see* United States ex rel. Siewick v. Jamieson Science and Engineering, 214 F.3d 1372 (D.C. Cir. 2000) (rejecting case premised on false certification of no conflict because law was unsettled).

²⁶⁴ U.S. Attorney's Office, Harvard Defendants Pay Over \$31 Million to Settle False Claims Act Allegations, Reports U.S. Attorney, Aug. 2, 2005 (press release) (available at <http://www2.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/08-03-2005/0004081794&EDATE=>).

²⁶⁵ 12 CFR 366.14(d).

²⁶⁶ 12 CFR 366.12(b).

The contracting out of government services is of enormous significance, both in terms of the many important services being outsourced, and in terms of the hundreds of billions of dollars the government spends every year for these services. In the course of performing these services, contractor employees exercise discretion and have access to government resources. They are in a position to abuse that discretion and those resources. This report has laid out the case that the government needs to prevent such abuses by imposing ethics standards on the employees of those service contractors.

This report has also uncovered several significant gaps in the empirical information about individuals performing services on behalf of the government. Answering these questions will enable the government to make more informed decisions about the relative need for ethics restrictions and the relative costs of different options for imposing them. This section identifies four of the most critical empirical questions.

The number of people who have individual contracts to perform services for the federal government, and whether they are covered by the government ethics rules.

This report began with a description of Dan Jester, a former Goldman Sachs official whose individual contract with the Treasury Department apparently enabled him to avoid coverage of the financial conflict of interest statute that applies to government employees. More than 130 agencies have authority to enter into service contracts with experts and consultants,²⁶⁷ but it is unclear how many agencies use that authority and how many individuals are hired through this contract mechanism. While Treasury apparently viewed Jester as exempt from government ethics restrictions, it is unclear whether consultants and experts hired in this way are considered “employees,” and thus subject to government ethics standards.²⁶⁸

²⁶⁷ GOVERNMENT ACCOUNTABILITY OFFICE, AMERICA COMPETES ACT: NIST APPLIED SOME SAFEGUARDS IN OBTAINING EXPERT SERVICES, BUT ADDITIONAL DIRECTION FROM CONGRESS IS NEEDED 19 (2009) (More than 130 agencies can “obtain temporary or intermittent services of experts and consultants under 5 U.S.C. § 3109.”)

²⁶⁸ *Id.* (it is unclear whether agencies obtaining these services must “appoint[] individuals as federal employees . . . or . . . [can] award[] personal services contracts in accordance with the FAR [Federal Acquisition Regulation]”).

The number of individuals performing such services under non-contract vehicles, such as grants, and the government's experience with imposing ethics restrictions on those individuals.

While this report has focused on contractors, the government actually awards more money in grants than in contracts.²⁶⁹ A significant portion of these grants are for research, and the government has more than a decade of experience in imposing ethics guidelines on the recipients of research grants.

While the government has not directly imposed restrictions on the employees of grant recipients, it has required those recipients to set up systems for monitoring their employees' conflicts of interest, including requirements that individuals working on government grants annually disclose to their employer any conflicting interests or certify that no conflicts exist. Thus, in the research sphere, we have more than a decade of experience with delegated monitoring. The government should evaluate grant recipients' record of monitoring to see whether that method has sufficiently protected the public's interest in unbiased research.

Government contractors' record in monitoring and reporting their own organizational conflicts of interest.

For more than a decade, the government has relied on its contractors to disclose their own organizational conflicts of interest or to certify that they had no such conflicts. In at least one case, the government alleged that a contractor's certification was false, and filed a False Claims Act lawsuit premised on those false certifications.²⁷⁰ In deciding whether to delegate to contractors the task of monitoring their employees' personal conflicts, it would be prudent to assess contractors' track record in monitoring and disclosing their organizational conflicts.

²⁶⁹ In FY 2007, the federal government spent \$440 billion on contracts and \$496 billion on grants. U.S. CENSUS BUREAU, CONSOLIDATED FEDERAL FUNDS REPORT FOR FISCAL YEAR 2007 v (2008).

²⁷⁰ *United States v. Science Applications International Corp.*, 653 F. Supp.2d 87 (D.D.C. 2009).

Whether annual financial disclosures have been effective in preventing financial conflicts of interest among government employees.

The government's primary method of preventing financial conflicts of interest among its own employees is by requiring hundreds of thousands of them to file annual financial disclosures. These disclosure requirements impose significant costs on the employees who must file them (both their time and their privacy) and on the government (such as the time that ethics officials spend reviewing these forms). Such costs may be justified if annual disclosures are effective in preventing conflicts.

But an annual disclosure form becomes out-of-date as soon as an employee buys or sells stock, and ethics officials' review of that disclosure is effectively out of date as soon as an employee's job responsibilities change (such as when she moves from one matter to another). The TARP regulations take this same approach,²⁷¹ and proposed personal conflict of interest regulation for meta-contracting would greatly expand this requirement.²⁷² Before imposing this expensive implementation mechanism on contractor employees, the government should determine how effective annual disclosures have been and whether another approach (such as requiring employees to certify with respect to particular tasks that they have no conflicts) would be more effective.

Conclusion

Up until the mid-twentieth century, the law allowed tort liability to lie only where there was privity between contracting parties. As a result, manufacturers were immune from tort liability as long as they did not enter into contractual relations with the ultimate consumers or those affected by their defective products. Eventually, as the complexity of the modern production and distribution system revealed the problems with the formalistic approach, the law adjusted, and recognized the appropriateness of imposing on the manufacturer the responsibility for making safe products, regardless of whether there was privity between the manufacturer and the injured party. This more realistic approach

²⁷¹ 31 CFR 31.217.

²⁷² 74 Fed. Reg. 58584 (Nov. 13, 2009).

ushered in an era when consumers were able to recover from manufacturers, and manufacturers had the incentive to protect consumers from defective products.

A similar change is needed with respect to government contractor employees. We need to recognize employees' ethical obligations to the government regardless of whether those individual employees have a contractual relationship with the government. Ethics needs to follow function, not formalism.

The current black and white distinction between government employees (who are subject to a full panoply of government ethics restrictions) and contractor employees (most of whom are subject to none) might have made some sense in an earlier era where contractors provided mostly products rather than services. But the last two decades have witnessed a dramatic outsourcing of government functions to contractors. Contractor employees are giving advice, making recommendations, and providing services that used to be the exclusive province of government employees. Government ethics regulation needs to catch up with the reality of outsourced government and needs to address the ethics issues that arise when contractor employees are doing the government's work.

As discussed above, for decades, the government's approach to ethics regulation has been primarily reactive rather than proactive. Perhaps it will continue with this approach and wait until an enterprising journalist discovers that the Interior Department's Minerals Management Service outsourced its evaluation of oil companies' safety procedures to someone who owned stock in BP, or that the Mine Safety Bureau outsourced safety inspections to a private contractor, and that the contractor assigned inspections to employees who owned stock in a coal company. The government should not wait for that enterprising journalist to identify the disaster that has been caused by our lax approach to government contractor ethics, but should take action to address contractor employee ethics before the next ethics disaster occurs.

The government should impose comprehensive ethics standards for the employees of its service contractors. For more than a decade, one agency, the FDIC, has imposed such ethics regulations on its contractors. The government should build on the FDIC's experience and impose such regulations across the entire executive branch.

Appendices

Table I: Ethics Restrictions on Executive Branch Employees, Special Government Employees & Contractor Employee

Table II: Post-Employment Restrictions on Executive Branch Employees, Special Government Employees & Contractor Employees

Table III: Expansion of Federal Service Contracting

Table IV: Proportion of Procurement Spending on Services v. Products

Table V: Selected Regulations of Service Contractor Employee Ethics

Table I:
Ethics Restrictions on Executive Branch Employees, SGEs & Contractor Employees

Citation	Restriction	Applies to: (all employees unless indicated otherwise)		Applies to SGEs?		Application to Contractor Employees
				SGEs 60+ days	SGE <60 days	
Constitutional provisions:						
Art. I, § 9, cl. 8 (Emoluments Clause)	accepting “any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State”	“Person[s] holding any Office of Profit or Trust” (i.e., exercising governmental authority) ⁱ				
Criminal statutes:						
18 U.S.C. § 201	Bribery; illegal gratuity	“officer or employee or person acting for or on behalf of the United States”		Yes		Yes ⁱⁱ
18 U.S.C. § 209	Salary supplementation	“officer or employee of the executive branch ”		Applies to SGE only if SGE is paid by govt ⁱⁱⁱ		No
18 U.S.C. § 205	Represent others against US	“officer or employee”		Apply to SGE if matter involves specific parties &: • SGE participated in the matter while in government; ^{iv} or		No
18 U.S.C. § 203	Receive compensation for representing others against US			if matter is pending in SGE’s agency ^v		No
18 USC § 219	Serve as agent for foreign principal	“officer or employee or person acting for or on behalf of the United States”		Applies to SGEs unless agency head certifies that SGE’s employment is required in the national interest. ^{vi}		Yes
18 U.S.C. § 208	Participating in a matter that has a direct & predictable effect on financial interest of • self • family member ^{vii} • employer • prospective employer ^{viii} • affiliated organization ^{ix}			Applies to SGEs, except SGEs who serve on FACA committee where • the matter is of general applicability & would effect SGE or SGE’s employer in a way similar to other class members; ^x or • agency official certifies that need for SGE’s services outweighs the COI; ^{xi} • the SGE is a nonvoting representative on a FDA-created FACA committee & the SGE’s financial interest arises from the class she represents; ^{xii} or • the FACA committee deals with medical products & the SGE’s financial interest arises from		No

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				<ul style="list-style-type: none"> her employment at a hospital that could use or sell the product or the use or prescription of the product for patients^{xiii} 	
41 USC 423	Disclosure of sensitive procurement information	“present or former official . . . person acting . . . on behalf of, or who . . . has advised the United States with respect to, a federal agency procurement”		Yes	Yes
Non-criminal statutes:					
5 USC § 7351	Gifts from subordinates	Employees		Yes	No
5 USC § 7353	gifts from parties that could be effected by employee’s duties or by her agency	“officer or employee ”		Yes	No
5 U.S.C. § 7342	Gifts from foreign governments & international organizations	Employees, “expert or consultant who is under contract under section [5 U.S.C. § 3109 . . . including, in the case of an organization performing services under such section, any individual involved in the performance of such services”		Yes	Yes if expert or consultant “hired” under 5 U.S.C. § 3109
5 U.S.C. § 7321 et seq.	Political activities on- and off-duty (Hatch Act)	Employees		Applies to SGEs while they are conducting government business	no
18 U.S.C. § 1913	Lobbying with appropriated funds				[31 U.S.C. § 3152]
5 USC Appx § 502	Permit employee’s name to be used by firm that provides professional services involving a fiduciary relationship	Noncareer employees above GS-15 (i.e., senior-level political appointees)		Does not apply to SGEs ^{xiv}	no
	Receive compensation for: <ul style="list-style-type: none"> practicing profession that involves a fiduciary relationship; affiliating with firm that 				

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	provides professional services involving fiduciary relationship; <ul style="list-style-type: none"> • serving as officer or board member of any association, corporation or other entity • teaching^{xv} 					
5 U.S.C. Appx. § 501(a)(1)	Limiting outside earned income to \$26,955 ^{xvi}					
5 USC Appx § 101	Public Financial Disclosure	<ul style="list-style-type: none"> • employee excepted from competitive service by reason of confidential or policymaking character;^{xvii} or • appointed pursuant to 5 USC § 3105^{xviii} 		Applies to SGEs (?)		No
		<ul style="list-style-type: none"> • Employees > GS-15, or receiving at least 120% of minimum GS-15 pay^{xix} 		Applies to 60+ SGEs ^{xx} <ul style="list-style-type: none"> • But may be allowed confidential disclosure if SGE provides services specially needed & it is unlikely that outside employment and financial interests will create a COI^{xxi} 	<60 SGEs must file <i>confidential</i> (rather than <i>public</i>) disclosures ^{xxii}	No
		<ul style="list-style-type: none"> • White House employees with a commission or appointment from the President^{xxiii} 		Does not apply to SGEs ^{xxiv}		No
26 U.S.C. § 1043	Certificate of divestiture			Not available to SGEs ^{xxv}		No

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26 USC § 4941	Imposing a tax on compensation & other transactions between private foundations & high level government officials	President, Vice-President, Presidential & Schedule C appointees, & employees paid at Senior Executive Service level ^{xxvi}		Does not apply to SGEs ^{xxvii}	No
Regulations:					
5 CFR 2534.901 et seq.	Confidential Financial Disclosure	All SGEs who are not required to file public financial disclosures ^{xxviii}		[Applies to SGEs]	No
		Employees < GS-15 or receiving less than 120% of minimum GS-15 pay if: <ul style="list-style-type: none"> Duties involve participation in decision or judgment re: <ul style="list-style-type: none"> Procurement, Administering or monitoring of grants, subsidies or other federal financial or operational benefits, Regulating or auditing a non-federal entity, or Other activities that will have a direct substantial economic effect on a non-federal entity, or Agency concludes that such reports are required, such as investigating or prosecuting violations of criminal or civil law^{xxix} 			No
		Optional Form 450-A (Confidential Certificate of No New Interests) - Permits incumbent confidential filers to certify no new interests rather than filing entire new form ^{xxx}		Not available to SGEs ^{xxxi}	n/a
5 CFR 2635.703	Using nonpublic information for private gain			Applies to SGEs	No
5 CFR	Misuse of			Applies to SGEs	No

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2635.101(b)(7) & 2635.703	government position for private gain					
5 C.F.R. 2635.804(a)	Limit on outside earned income	Presidential appointees to full-time noncareer positions		Does not apply to SGEs	No	
5 CFR 2635.807	compensation for teaching, speaking and writing	<ul style="list-style-type: none"> activity is part of employee's duties; invitation was extended primarily because of employee's position; Invitation or compensation is from someone with interests that could be affected by employee's duties; or Information draws substantially on nonpublic information 		Applies to SGEs	No	
		subject matter deals with:	Any matter to which employee is currently or has been assigned in previous year ^{xxxii}	Applies to 60+ SGEs only during current appointment (?)	Applies to <60 SGEs only with respect to particular matters involving specific parties	No
			Ongoing policy, program or operation of employee's agency ^{xxxiii}	Does not apply to SGEs	No	
		Noncareer employee & subject matter deals with:	Subject matter, industry or economic sector affected by agency ^{xxxiv}	Does not apply to SGEs	No	
5 CFR 2635.808	fundraising	may not solicit funds from a subordinate; ^{xxxv} may not permit use of title or position to further fundraising; ^{xxxvi}		Applies to SGEs	No	
		may not solicit funds from someone the employee knows is a prohibited source ^{xxxvii}		Applies to SGE <i>only if</i> the prohibited source's interests may be substantially affected by employee's performance of duties ^{xxxviii}	No	
5 CFR 2635.805	expert witness	Serving as expert witness in a proceeding in which US is a party or		Applies to any SGE who participated in the particular proceeding or matter; ^{xxxix}	No	

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		has a substantial interest					
		Serving as expert witness in a proceeding in which <i>employing agency</i> is a party or has a substantial interest ^{xi}		Applies to all 60+ SGEs ^{xli}	Applies to <60 SGE who <ul style="list-style-type: none"> was appointed by the President;^{xlii} or serves on a commission created by statute.^{xliii} 	No	
5 CFR 2635.201 et seq.	Employees cannot solicit or accept gifts from “prohibited sources:” – includes contractors & contractor employees ^{xliv}			Applies to SGEs		No	
5 C.F.R. § 2635.502	Participate in matter that could affect financial interest of household member or associate, or where her impartiality could reasonably be questioned			Applies to SGEs		No	
48 C.F.R. § 3.601	prohibits a contracting officer from awarding a contract to a Government employee			Applies to SGEs only if: <ul style="list-style-type: none"> contract arose directly out of SGE’s activities; the SGE was in a position to influence the contract award; or there is another conflict of interest 		No	
48 CFR 1503.601	EPA FAR rule prohibits awarding contract to current or former (within 1 year) EPA employee who were involved in the proposal			Applies to all 60+ SGEs	No ^{xlv}	No	
48 CFR	Broadcasting Board					No	

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1903.670	of Governors regulation prohibits awarding contract to current or former (within 2 years) BBG employees who were involved in the proposal						

Table II:
Post-Employment Restrictions on Executive Branch Employees, SGEs, ITEP Detailees from Industry & Contractor Employees

18 U.S.C. § 207	Trigger in govt	Scope of ban	Duration	Ban on Communication	Ban on Representation n / Advice	Application to Information Technology Exchange Program detailees from industry			Application to SGEs:		Application to Contractor Employees
						identical	modified	None	SGEs 60+ days	SGE <60 days	
(a)(1)	participated personally and substantially in a matter	Same matter	permanent	x		x			x	X	No
(a)(2)	Matter was pending under employee during last year in govt	Same matter	2 years	x		x			x	x	No
(c)	senior official	Contact officials in agency where worked during last year in govt	1 year	x		X			x		No
(d)	Very senior official	Contact officials in agency where worked during last year in govt or high level officials in any agency	2 years	x		X			X	x	No
(b)	Trade or treaty negotiator	Representation regarding negotiations	1 year		X	X			x	x	No
(f)	senior official	Represent foreign govts & political parties	1 year		X	X			x	Very senior SGEs <60 days	No
(f)(2)	US Trade Representative (USTR) &	Represent foreign govts & political	permanent		x	x			X?	X?	No

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[illegible]

Table III:
Proportion of Procurement Spending on
Services vs. Products

Year	Type of Spending	
	Services	Products
1983	0.459619173	0.540380827
1984	0.458358298	0.541641702
1985	0.437260274	0.562739726
1986	0.457831325	0.542168675
1987	0.500280112	0.499719888
1988	0.508902929	0.491097071
1989	0.526378186	0.473621814
1990	0.531815528	0.468184472
1991	0.550105485	0.449894515
1992	0.602362205	0.397637795
1993	0.601794728	0.398205272
1994	0.639954207	0.360045793
1995	0.642699115	0.357300885
1996	0.637178052	0.362821948
1997	0.636574074	0.363425926
1998	0.645464602	0.354535398
1999	0.649371928	0.350628072
2000	0.624078624	0.375921376
2001	0.629406308	0.370593692
2002	0.641123883	0.358876117
2003	0.640372029	0.359627971
2004	0.622871046	0.377128954
2005	0.602659574	0.397340426
2006	0.590591074	0.409408926
2007	0.583859039	0.416140961

Table IV:
Amount of Contracting
(billions of dollars)

Year	Type of Service		
	Research & Development	Non-R&D Services	All Services
1983	21.6	48.4	70.0
1984	24.5	52.0	76.5
1985	25.7	54.1	79.8
1986	25.7	57.8	83.5
1987	27.0	62.3	89.3
1988	27.4	61.2	88.6
1989	28.9	60.0	88.9
1990	28.3	62.8	91.1
1991	28.0	76.4	104.4
1990	29.3	77.8	107.1
1993	29.7	77.6	107.3
1994	27.6	84.2	111.8
1995	28.3	87.9	116.2
1996	28.2	85.6	113.8
1997	25.6	84.4	110.0
1998	25.6	91.1	116.7
1999	24.5	94.4	118.9
2000	23.6	103.4	127.0
2001	26.6	109.1	135.7
2002	31.3	119.3	150.6
2003	38.2	147.7	185.9
2004	49.4	155.4	204.8
2005	47.7	178.9	226.6
2006	51.1	193.7	244.8
2007	54.9	213.5	268.4

Table V
SELECTED REGULATIONS OF SERVICE CONTRACTOR EMPLOYEE ETHICS

SUBSTANTIVE RESTRICTIONS:

a. Financial Influences

- **Conflicting financial interests:**

Agency	Contracts Affected	Employees Affected	Prohibition
Energy	Mgmt. & Operations ^{xlvi}	employees assigned to work under the contract ^{xlvi}	make or influence any decisions on behalf of the contractor which directly or indirectly affect the interest of the Government, if the employee's personal concern in the matter may be incompatible with the interest of the Government ^{xlvi}
EPA	Superfund contracts > \$150,000	Consultants and employees of contractors & subcontractors	a relationship with an entity that may impair their objectivity in performing the contract work ¹
	Bid evaluation	all	any "conflict of interest . . . that may diminish [his] capacity to perform an impartial, technically sound, objective review of [the] proposal[] or otherwise result in a biased opinion or unfair competitive advantage" ^{li}
FDIC	All	all	"a personal, business, or financial interest or relationship that relates to the services . . . perform[ed] under the contract" ^{lii}
NRC	Research, Evaluation, Technical Consulting, Mgmt. Support Services & Those resulting from	chief executive, directors, key personnel identified in the contract & proposed consultants ^{liv}	"a . . . present or planned interest[] related to . . . [work to be performed under the] contract which: (1) May diminish its capacity to give impartial, technically sound, objective assistance and advice, or may otherwise result in a biased work product; or (2) May result in its being given an unfair competitive advantage" ^{lv}

	unsolicited proposals ^{liii}		
Treasury	TARP contracts and financial agency agreements ^{lvi}	“key individuals” ^{lvii} & “management officials performing work under the” contract ^{lviii}	“a personal, business, or financial interest of an individual, his or her spouse, minor child, or other family member with whom the individual has a close personal relationship, that could adversely affect the individual's ability to perform under the arrangement, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury” ^{lix}
USAID	Contracts performed in a foreign country	all employees & consultants ^{lx}	“make loans or investments to or in any business, profession or occupation” in that country ^{lxi}

- Gifts

Agency	Contracts Affected	Employees Affected	Prohibition
Energy	Mgmt. & Operations	employees assigned to work under the contract	accept any gratuity or special favor from individuals or organizations with whom the contractor is doing business, or proposing to do business, in accomplishing the work under the contract “under circumstances <i>which might reasonably be interpreted as an attempt to influence the recipients in the conduct of their duties</i> ” ^{lxii}
FDIC	All	All	Accept / solicit for self / others any favor / gift / item of monetary value “from any person who you reasonably believe is seeking an official action from you on our behalf, or has an interest that the performance or nonperformance of your duties to us may substantially affect” ^{lxiii}
HHS	Medicaid Integrity Audit Program	employees, agents & subcontractors	“receive[], solicit[], or arrange[] to receive any . . . gift, . . . payment of expenses, . . . or any other thing of value from any entity that is reviewed, audited, investigated, or contacted during the normal course of performing” the contract ^{lxiv}
Treasury	TARP	Officers, partners & employees	Accept / solicit favors / gifts / items of monetary value from any individual or entity whom the retained entity / officer / partner / employee knows is seeking official action from the Treasury in connection with the arrangement or has interests which may be substantially affected by the performance or nonperformance of duties to the Treasury under the arrangement. ^{lxv}

- **conflicting employment**

Agency	Contracts Affected	Employees Affected	Prohibition
Energy	Mgmt. & Operations	employees assigned to work under the contract	outside employment that will: <ul style="list-style-type: none"> • “interfere with the proper and effective performance of the[ir] duties” • “[a]pppear to create a conflict-of-interest”, or • “[a]pppear to subject DOE or the contractor to public criticism or embarrassment”^{lxvi}
FDIC	All	all	“Has a personal, business, or financial interest or relationship that relates to the services . . . perform[ed] under the contract” ^{lxvii}
HHS	Medicaid Integrity Audit Program	employees, agents & subcontractors	“receive[], solicit[], or arrange[] to receive any fee, compensation, . . . payment of expenses, offer of employment, or any other thing of value from any entity that is reviewed, audited, investigated, or contacted during the normal course of performing” the contract ^{lxviii}
NRC	Research, Evaluation, Technical Consulting, Mgmt. Support Services & Those resulting from unsolicited proposals	all employees under the contract ^{lxix}	<ul style="list-style-type: none"> • “represent, assist, or otherwise support an NRC licensee or applicant undergoing an NRC audit, inspection, or review where the activities that are the subject of the audit, inspection, or review are the same as or substantially similar to the services within the scope of this contract”^{lxx} • “consulting or other contractual arrangements with any firm or organization the result of which may give rise to a conflict of interest with respect to the work being performed under this contract.”^{lxxi}
		Employees working “at any NRC licensee or applicant site”	<ul style="list-style-type: none"> • “solicit work at that site for that licensee or applicant during the period of performance of the task order or the contract”^{lxxii} • “perform work at that site for that licensee or applicant during . . . [contract] and for one year thereafter”^{lxxiii} • “solicit []or perform work in the same or similar technical area for that licensee or applicant organization . . . [during contract and for] one year after completion of all work under the associated task order, or last time at the site (if not a task order contract).”^{lxxiv}
Treasury	TARP contracts involving acquisition / valuation / management / disposition of	management officials performing work under the arrangement & key individuals	purchase / offer to purchase / assist anyone in purchasing / offering to purchase assets ^{lxxv}

	specific troubled assets		
	TARP contracts involving giving advice re: purchase of troubled assets		sell / offer to sell / act on behalf of any with respect to sale of asset to Treasury ^{lxxvi}
USAID	performed in a foreign country	all employees & consultants	“engage, directly or indirectly, either in his/her own name or in the name or through the agency of another person, in any business, profession or occupation in” that country ^{lxxvii}

b. Misuse of Government Resources

- government information

Agency	Contracts Affected	Employees Affected	Prohibition
Energy	Mgmt. & Operations	employees assigned to work under the contract	“use privileged information for personal gain, or make other improper use of privileged information which is acquired in connection with their employment on contract work” ^{lxxviii}
EPA	Bid evaluation	all	<ul style="list-style-type: none"> disclose information relating to the proposal use proposal information for any purpose other than evaluating bid^{lxxix}
FDIC	all	all	use or disclose information obtained from FDIC or a third party in connection with an FDIC contract ^{lxxx}
NRC	Research, Evaluation, Technical Consulting, Mgmt. Support Services & Those resulting from unsolicited proposals	all employees under the contract	<ul style="list-style-type: none"> use information protected by the Privacy Act of FOIA for a private purpose until the information has been released to public^{lxxxi} disclose such information^{lxxxii}
Treasury	TARP	management officials performing work under the arrangement &	<ul style="list-style-type: none"> “Disclose nonpublic information to anyone” “Use or allow the use of any nonpublic information to further any private interest”^{lxxxiv}

		key individuals ^{lxxxiii}	
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- **government property**

Agency	Contracts Affected	Employees Affected	Prohibition
FDIC	All	All	“Use or allow the use of [FDIC] property, except as specified in the contract” ^{lxxxv}
Treasury	TARP	officers, partners & employees	“Improperly use or allow the improper use of Treasury property for the personal benefit of any individual or entity other than the Treasury” ^{lxxxvi}

- **impartiality**

Agency	Contracts Affected	Employees Affected	Prohibition
FDIC	all	All	<ul style="list-style-type: none"> • provide preferential treatment to anyone in their dealings on behalf of the FDIC^{lxxxvii} • engage “in an activity that would cause [FDIC] to question the integrity of the service you provided, are providing or offer to provide us, or impairs your independence”^{lxxxviii}

c. Outside Activities

Agency	Contracts Affected	Employees Affected	Prohibition
FDIC	all	all	<ul style="list-style-type: none"> • Engage in activity that would impair independence^{lxxxix} • Have any relationships that relate to the services they are performing^{xc} • Represent a party in litigation against FDIC^{xcii} • Participate as a party in litigation against FDIC^{xcii}

d. Restrictions After the End of a Contract

Agency	Contracts Affected	Employees Affected	Prohibition
FDIC	all	all	submit “an offer to acquire an asset from [FDIC] for which services were performed during

			the past three years.” ^{xciii}
NRC	Research, Evaluation, Technical Consulting, Mgmt. Support Services & Those resulting from unsolicited proposals	Those performing work for the NRC under this contract at any NRC licensee or applicant site	solicit / perform work in the same or similar technical area or at that site for that licensee or applicant organization for 1 year after work is completed ^{xciv}

IMPLEMENTATION MECHANISMS

- Contractor Must Obtain from Employees Disclosures / Certifications**

Agency	Contracts Affected	Employees Affected	Required Disclosure/Certification
Energy	Mgmt. & Operations	employees assigned to work under the contract	<ul style="list-style-type: none"> “any actual or potential conflicts with DOE's policies regarding conduct of employees of DOE's contractors” “outside employment services which involve the use of information in the area of the employee's employment with the contractor”^{xcv}
Treasury	TARP	“key individuals” & “management officials performing work under the” contract	<ul style="list-style-type: none"> “information . . . in writing about their personal, business, and financial relationships, as well as those of their spouses, minor children, and other family members with whom the individuals have a close personal relationship that would cause a reasonable person with knowledge of the relevant facts to question the individual's ability to perform, his or her objectivity or judgment in such performance, or his or her ability to represent the interests of the Treasury”^{xcvi} certification that they will not <ul style="list-style-type: none"> disclose nonpublic information use or allow the use of nonpublic information to further any private interest^{xcvii}
	TARP contracts involving “acquisition, valuation, management,		the information described above at a level of detail at least as extensive as the public financial disclosures required of high-level officials (Office of Government Ethics Form 278) ^{xcviii}

	or disposition of troubled assets”		
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• **Disclosure of Financial Interests / Certification of No Conflicting Interests to Agency**

Agency	Contracts Affected	Employees Affected	Required Disclosure/Certification
Energy	Mgmt. & Operations	employees assigned to work under the contract	Employees’ disclosures to contractor described above ^{xcix}
EPA	Bid evaluation	All	Individual certifies that he has “no conflict of interest . . . that may diminish [his] capacity to perform an impartial, technically sound, objective review of this proposal(s) or otherwise result in a biased opinion or unfair competitive advantage” ^c
	Superfund contracts > \$150,000 ^{ci}	Employees, subcontractor employees or consultants working on or having access to information regarding the contract ^{cii}	Contractor must disclose any “relationship of an employee, subcontractor employee, or consultant with an entity that may impair the objectivity of the employee, subcontractor employee, or consultant in performing the contract work.” ^{ciii}
	all	chief executive, directors & any proposed consultant or subcontractor	Prospective contractor must: Either: <ul style="list-style-type: none"> • Certify that it is not aware of “any information bearing on the existence of any organizational conflict of interest” Or: <ul style="list-style-type: none"> • “describe[] concisely all relevant facts concerning any past, present, or planned interests relating to the work to be performed and bearing on whether . . . their chief executive[], directors, or any proposed consultant or subcontractor, may have a potential organizational conflict of interest.”^{civ}
FDIC	All	All	<ul style="list-style-type: none"> • certify “in writing that you . . . have no conflict of interest under” 12 CFR 366.10(a).”^{cv}

			<ul style="list-style-type: none"> notify “within 10 business days after you become aware that you, or any person you employ to perform services for us, are not in compliance with this part”^{cv}
		Those who previously worked at the FDIC	<ul style="list-style-type: none"> sign a certification form that <ul style="list-style-type: none"> he was not a “senior employee” subject to a 1-year cooling off period; and his work for contractor does not involve any matter <ul style="list-style-type: none"> he participated personally & substantially in or under his official authority while at FDIC / RTC^{cvii}
Treasury	TARP contracts and financial agency agreements	“key individuals” & “management officials performing work under the” contract	Certify that these individuals have no personal conflicts of interest, or are subject to a mitigation plan or waiver approved by Treasury ^{cviii}

- Agreement to employ only employees who meet ethics criteria**

Agency	Contracts Affected	Employees Affected	Provision
FDIC	All	All	Agree in writing to “employ only persons who meet the requirements of this part to perform services on our behalf” ^{cxix}

- Train employees about ethics standards**

Agency	Contracts Affected	Employees Affected	Provision
Energy	Mgmt. & Operations	employees assigned to work under the contract	must “inform[] employees that they are expected to disclose any incompatibilities between duties performed for the contractor and their private interests and to refer undecided questions to the contractor.” ^{cx}
FDIC	All	All	“must ensure that any person you employ to perform services for [FDIC] is informed about their responsibilities under this part” ^{cx}
Treasury	TARP contracts and financial	All “persons receiving nonpublic	Must provide “[p]eriodic training to ensure that [they] know their obligation to maintain its confidentiality and to use it only for purposes contemplated by the arrangement” ^{cxii}

	agency agreements	information”	
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• **Agency Official Charged with Evaluating and Conflicts**

Agency	Contracts Affected	Official	Responsibilities
FDIC	All	Contracting Officer	<ul style="list-style-type: none"> ensure that the FDIC <i>Integrity and Fitness</i> clause 7.3.2-46 is included in the request for proposal or request for quotation for services estimated to cost greater than \$100,000^{cxi} “ensure that a contractor being considered for an award has not been suspended or excluded from performing services” by FDIC or the federal government^{cxiv} review contractors’ representations & certifications for completeness & identify potential issues that could affect eligibility^{cxi} consult with Acquisition Services Branch’s Policy and Operations Section and the Legal Division Contracting Law Unit if “there are issues regarding” application of COI regulations^{cxi} “forwards all conflicts of interest issues to the CLU for review and determination”^{cxi} can seek from Legal Division a waiver of suspension or exclusion when he “determines it is in the corporation’s best interest”^{cxi}
		Legal Division Contracting Law Unit (CLU)	<ul style="list-style-type: none"> “reviews conflicts of interests raised by the representations and certifications submitted by a contractor recommended for an award”^{cxi} “issues a written decision of its determination”^{cxi} “prepares the cases for eligibility determination, waiver of conflicts of interest, appeal from final decisions, and other documents for the Corporation Ethics Committee (CEC)”^{cxi} “may suspend or exclude contractors that violate” ethics regulations^{cxi} responsible for administration of Suspension and Exclusion regulations for all contractors except law firms^{cxi}
		Legal Division	can waive a suspension or exclusion when requested by Contracting Officer
		Legal Division Ethics Unit	point of contact for matters involving post-government employment restrictions
		Acquisition Services Branch (ASB)	reviews all cases prior to their submission to Corporation Ethics Committee (CEC) ^{cxi}
		Executive Secretary (“Ethics Counselor”)	decides all cases against contractors for suspension or exclusion ^{cxi}

		Assistant General Counsel of the Corporate and Legal Operations (AGC-CLO)	can waive a conflict of interest if the request is “simple and straightforward” (AGC-CLO decisions can be appealed to CEC) ^{cxxvi}
		Corporation Ethics Committee (CEC)	<ul style="list-style-type: none"> • can “reverse, stay, or uphold a final decision of the AGC-CLO” re: waiver^{cxxvii} • can “reverse, stay, or uphold a final decision” of Executive Secretary re: suspension / exclusion^{cxxviii} • can waive a conflict of interest if the request is “more complicated”^{cxxix}
Treasury	TARP	TARP Chief Compliance Officer	<ul style="list-style-type: none"> • Identifies “administrative services” that are exempt from COI regulations^{cxxx} • Receives contractors’ written notification of OCIs^{cxxxi} & disclosure/use of nonpublic information^{cxxxii} • Evaluates whether proposed measures adequately mitigate PCIs^{cxxxiii} • Can waive PCIs^{cxxxiv} • Can waive any regulatory requirement “that is not otherwise imposed by law when it is clear from the totality of the circumstances that a waiver is in the government's interest”^{cxxxv}

ⁱ The Justice Department’s Office of Legal Counsel has opined that the Emoluments Clause does not apply to purely advisory positions. Memorandum Opinion for the Associate Counsel to the President from Noel J. Francisco, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Emoluments Clause to a Member of the President’s Council on Bioethics* at 10 (Mar. 9, 2005).

ⁱⁱ See *Dixon v. United States*, 465 U.S. 482 (1984) (bribery statute reaches individuals who administer federal grant even though neither they nor their employer has a contractual relationship with federal government).

ⁱⁱⁱ 18 U.S.C. § 209(c).

^{iv} 18 U.S.C. §§ 203(c)(1), 205(c)(1).

^v 18 U.S.C. §§ 203(c)(2), 205(c)(2).

^{vi} 18 U.S.C. § 219(b).

^{vii} The financial interests of employee’s spouse and minor children are imputed to the employee. 18 U.S.C. § 208(a).

^{viii} This applies to “organization[s] with whom [the employee] is negotiating or has any arrangement concerning prospective employment.” 18 U.S.C. § 208(a).

^{ix} This applies to “organization[s] in which [the employee] is serving as officer, director, trustee, [or] general partner.” 18 U.S.C. § 208(a).

^x 5 C.F.R. 2640.203(g). This exception applies as long as the SGE’s financial interest arises as a result of her employment, rather than as a result of any stock she may own in her employer. *Id.*

^{xi} 18 U.S.C. § 208(b)(3).

^{xii} 5 C.F.R. § 2640.203(j)

^{xiii} 5 C.F.R. 2640.203(i).

^{xiv} 5 U.S.C. Appx. § 501(2).

^{xv} unless employee obtains prior approval of agency

^{xvi} 5 U.S.C. Appx. § 501(a)(1).

^{xvii} 5 USC Appx § 101(f)(5).

^{xviii} 5 USC Appx § 101(f)(4).

^{xix} 5 USC Appx § 101(f)(3). As of January, 2010, 120% of the minimum GS-15 rate of pay is \$119,533.60. Office of Government Ethics website (available at http://www.usoge.gov/news/whats_new_2010.aspx#75fr16890)

^{xx} 5 USC Appx § 101(d).

^{xxi} 5 C.F.R. 2634.205(a).

^{xxii} 5 C.F.R. 2634.201(a); 2634.204(a).

^{xxiii} 5 USC Appx § 101(f)(8).

^{xxiv} 5 USC Appx § 101(f)(8).

^{xxv} 26 U.S.C. § 1043(b)(A); 5 C.F.R. § 2634.1003(1).

^{xxvi} 26 USC § 4946(c).

^{xxvii} 26 USC § 4946(c).

^{xxviii} 5 C.F.R. 2634.904(a)(2) (all SGEs -- except those required to file public financial disclosures -- are required to file confidential financial disclosures). They must file these reports upon appointment or reappointment, but are not required to file incumbent reports on an annual basis unless they also meet the criteria listed in 5 C.F.R. 2634.904(a)(1). See 5 C.F.R. 2634.903(a).

^{xxix} 5 C.F.R. 2634.904(a)(1).

^{xxx} 5 CFR 2534.905(a).

^{xxxi} 5 CFR 2534.905(b)(1). (This may not be available to SGEs because SGEs are required to file new entrant forms, not incumbent forms.)

^{xxxii} 5 C.F.R. 2635.807(a)(2)(i)(E)(1).

^{xxxiii} 5 C.F.R. 2635.807(a)(2)(i)(E)(2).

^{xxxiv} 5 C.F.R. 2635.807(a)(2)(i)(E)(3).

^{xxxv} 5 C.F.R. § 2635.808(c)(1).

^{xxxvi} 5 C.F.R. § 2635.808(c)(2).

^{xxxvii} 5 C.F.R. § 2635.808(c)(1)(i).

^{xxxviii} 5 C.F.R. § 2635.808(c)(1)(ii).

^{xxxix} 5 C.F.R. § 2635.805(a).

^{xl} 5 C.F.R. § 2635.805(b).

^{xli} 5 C.F.R. § 2635.805(b)(2)(iii).

^{xlii} 5 C.F.R. § 2635.805(b)(2)(i).

^{xliii} 5 C.F.R. § 2635.805(b)(2)(ii).

^{xliv} 5 C.F.R. § 2635.102(k) (definition of person includes not only an entity but also any employee of that entity)

^{xliv} 48 CFR 1503.600-71(b)

* These provisions are non-criminal, but provide for civil monetary penalties and administrative penalties, such as contract rescission, suspension or debarment, 41 U.S.C. 423(e), and industry-wide prohibition orders. 12 U.S.C. §§ 1820(k)(6); §1786(w)(5).

^{xlv} Information Technology Exchange Program detailees from industry may not disclose this information until 3 years after leaving government, even if the contract has already been awarded. 41 U.S.C. § 423(a)(1), 5 U.S.C. §§ 3701 et seq.

^{xlvii} 48 CFR 970.0371-2.

^{xlviii} 48 CFR 970.0371-3.

^{xlix} 48 CFR 970.0371-6(a). The regulation gives two examples of such conflicting interests:

- “An employee . . . negotiat[ing], or influence[ing] the award of, a subcontract with a company in which the individual has an employment relationship or significant financial interest;”

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- “an employee . . . evaluati[ng] for DOE or for any DOE contractor . . . some technical aspect of the work of another organization with which the individual has an employment relationship, or significant financial interest, or which is a competitor of an organization (other than the contractor who is the individual's regular employer) in which the individual has an employment relationship or significant financial interest.” *Id.*

ⁱ 48 CFR 1552.209-73(b).

^{li} 48 CFR 1503.104-5 (prescribing contract clause).

^{lii} 12 CFR 366.10(a)(1).

^{liii} 48 CFR 2009.570-4(b).

^{liv} 48 CFR 2009.570-2.

^{lv} 48 CFR 2009.570-2.

^{lvi} 31 CFR 31.200(b). The regulation permits the TARP Chief Compliance Officer to exempt contracts for administrative services. 31 CFR 31.201.

Financial agency agreements are in some respects distinct from most government contracts in that they are not subject to the Federal Acquisition Regulations and they can involve the delegation of inherently functions, this article uses the term “contract” to refer to both regular contracts and financial agency agreements under TARP.

^{lvii} A “key individual” is “an individual providing services to a private sector entity who *participates personally and substantially*, through decision, approval, disapproval, recommendation, or the rendering of advice, in the negotiation or performance of, or monitoring for compliance under” the contract. 31 CFR 31.201 (emphasis added).

^{lviii} 31 CFR 31.212(a). A “Management official” is “an individual within a retained entity's organization who has substantial responsibility for the direction and control of the retained entity's policies and operations,” including members of a management committee or executive committee or (in entities without such a committee) general partners. 31 CFR 31.201.

^{lix} 31 CFR 31.201. The TARP regulation does not impose restrictions directly on contractor employees. Instead, it mandates that contractors “ensure that [their employees “have no personal conflicts of interest.”

^{lx} 48 CFR 752.7027. This restriction does not apply to employees or consultants who are nationals of foreign country where they are performing under the contract.

^{lxi} 48 CFR 752.7027.

^{lxii} 48 CFR 970.0371-4 (emphasis added).

^{lxiii} 12 CFR 366.12(d)(1).

^{lxiv} 42 CFR 455.238(b)(1) The regulation does not directly prohibit these activities. It simply says that if these activities take place, they would constitute a post-award conflict of interest, and that the government can then terminate / modify / not renew the contract.

^{lxv} 31 CFR 31.213(a)(1).

^{lxvi} 48 CFR 970.0371-7 (DOE M&O).

^{lxvii} 12 CFR 366.10(a)(1).

^{lxviii} 42 CFR 455.238(b)(1).

^{lxix} 48 CFR 2052.209-72(c)(1).

^{lxx} 48 CFR 2052.209-72(c)(2).

^{lxxi} 48 CFR 2052.209-72(c)(1).

^{lxxii} 48 CFR 2052.209-72(c)(4)(i).

^{lxxiii} 48 CFR 2052.209-72(c)(4)(ii).

^{lxxiv} 48 CFR 2052.209-72(c)(3).

^{lxxv} 31 CFR 31.214(a).

^{lxxvi} 31 CFR 31.214(b).

^{lxxvii} 48 C.F.R. 752.7027.

^{lxxviii} 48 CFR 970.0371-5. The regulation defines “privileged information” as “include[ing] but . . . not limited to, unpublished information relating to technological and scientific developments; medical, personnel, or security records of individuals; anticipated materials' requirements or pricing action; possible new sites for DOE program operations; internal DOE decisions; policy development; and knowledge of selections of contractors or subcontractors in advance of official announcement.” *Id.*

lxxxix 48 CFR 1503.104-5.

lxxx 12 CFR 366.13(a). The regulation provides for exceptions where the contract allows or the FDIC authorizes the use or disclosure, the “information is generally available to the general public,” or the FDIC makes the information available to the public. *Id.*

lxxxi 48 CFR 2052.209-72(e)(1)(i).

lxxxii 48 CFR 2052.209-72 (contractor must not disclose confidential information without prior written approval of contracting officer).

lxxxiii 31 CFR 31.217(c)(5). The TARP regulation does not impose confidentiality requirement directly on these contractor employees. Instead, it imposes these confidentiality restrictions on the contracting entity and requires that the entity to obtain from these individuals nondisclosure agreements.

lxxxiv 31 CFR 31.217(b). The TARP regulation defines “nonpublic information” as “Any information that Treasury provides to a [contractor] . . . , or that the [contractor] obtains or develops pursuant to the arrangement . . . until the Treasury determines otherwise in writing, or the information becomes part of the body of public information from a source other than the retained entity.” 31 CFR 31.217(a).

lxxxv 12 CFR 366.12(d)(2).

lxxxvi 31 CFR 31.213(a)(2).

lxxxvii 12 CFR 366.12(a) (FDIC).

lxxxviii 12 CFR 366.10(a)(4).

lxxxix 12 C.F.R. § 366.10.

xc 12 C.F.R. § 366.10.

xci 12 CFR 366.10(a)(2).

xcii 12 CFR 366.10(a)(2).

xciii 12 CFR 366.10(a)(3). The regulation provides an exception the contract allows for the acquisition. *Id.*

xciv 48 CFR 2052.209-72.

xcv 48 CFR 970.0371-8(a).

xcvi 31 CFR 31.212(b).

xcvii 31 CFR 31.217(c)(5).

xcviii 31 CFR 31.212(b).

xcix 48 CFR 970.0371-8(b).

c 48 CFR 1503.104-5 (prescribing contract clause).

ci 48 CFR 1509.507-2(c) (applicable to Superfund contracts “in excess of the simplified acquisition threshold”).

cii 48 CFR 1552.209-73.

ciii 48 CFR 1552.209-73.

civ 48 CFR 1509.505-70(a).

cv 12 C.F.R. § 366.14(a).

cvi 12 CFR 366.14(c).

cvi FDIC Post-Government Employment Certification (available at <http://www.fdic.gov/buying/goods/acquisition/PostGovtEmploymentCert.pdf>)

cvi 31 CFR 31.212(d).

cix 12 CFR 366.14(d).

cx 48 CFR 970.0371-6(b) (“In making this certification, the [contractor] may rely on the information obtained [from its employees] . . . unless [it] knows or should have known that the information provided is false or inaccurate.”).

cx 12 CFR 366.12(b).

cxii 31 CFR 31.217(c)(3).

cxiii FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.304 (2008).

cxiv FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.307 (2008).

cxv FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(a) (2008).

- cxvi FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.304 (2008).
- cxvii FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.306(b) (2008).
- cxviii FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.307 (2008).
- cxix FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(b) (2008).
- cxx FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(b) (2008).
- cxxi FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(b) (2008).
- cxxii FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.307 (2008).
- cxxiii FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.310(a) (2008).
- cxxiv FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(b) (2008).
- cxxv FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.310(b) (2008).
- cxxvi FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(e) (2008).
- cxxvii FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(e) (2008).
- cxxviii FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.310(b) (2008).
- cxxix FDIC, ACQUISITION PROCEDURES, GUIDANCE AND INFORMATION § 1.309(e) (2008).
- cxxxx 31 CFR 31.200(b).
- cxxxi 31 CFR 31.211(f).
- cxxxii 31 CFR 31.217(c).
- cxxxiii 31 CFR 31.212(c).
- cxxxiv 31 CFR 31.212(c).
- cxxxv 31 CFR 31.215.